S. HRG. 104-857

VOLUNTARY ENVIRONMENTAL AUDIT PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 582

A BILL TO AMEND TITLE 28, UNITED STATES CODE, TO PROVIDE THAT CERTAIN VOLUNTARY DISCLOSURES OF VIOLATIONS OF FEDERAL LAWS MADE PURSUANT TO AN ENVIRONMENTAL AUDIT SHALL NOT BE SUBJECT TO DISCOVERY OR ADMITTED INTO EVIDENCE DURING A FEDERAL JUDICIAL OR ADMINISTRATIVE PROCEEDING, AND FOR OTHER PURPOSES

MAY 21, 1996

Serial No. J-104-83

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
40-017 WASHINGTON : 1997

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-055091-2

S. HRG. 104-857

VOLUNTARY ENVIRONMENTAL AUDIT PROTECTION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED FOURTH CONGRESS

SECOND SESSION

ON

S. 582

A BILL TO AMEND TITLE 28, UNITED STATES CODE, TO PROVIDE THAT CERTAIN VOLUNTARY DISCLOSURES OF VIOLATIONS OF FEDERAL LAWS MADE PURSUANT TO AN ENVIRONMENTAL AUDIT SHALL NOT BE SUBJECT TO DISCOVERY OR ADMITTED INTO EVIDENCE DURING A FEDERAL JUDICIAL OR ADMINISTRATIVE PROCEEDING, AND FOR OTHER PURPOSES

MAY 21, 1996

Serial No. J-104-83

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

40-017 WASHINGTON : 1997

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402
ISBN 0-16-055091-2

COMMITTEE ON THE JUDICIARY

ORRIN G. HATCH, Utah, *Chairman*

STROM THURMOND, South Carolina
ALAN K. SIMPSON, Wyoming
CHARLES E. GRASSLEY, Iowa
ARLEN SPECTER, Pennsylvania
HANK BROWN, Colorado
FRED THOMPSON, Tennessee
JON KYL, Arizona
MIKE DEWINE, Ohio
SPENCER ABRAHAM, Michigan

JOSEPH R. BIDEN, JR., Delaware
EDWARD M. KENNEDY, Massachusetts
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois
HERBERT KOHL, Wisconsin
DIANNE FEINSTEIN, California
RUSSELL D. FEINGOLD, Wisconsin

MARK R. DISLER, *Chief Counsel*
MANUS COONEY, *Staff Director and Senior Counsel*
CYNTHIA C. HOGAN, *Minority Chief Counsel*
KAREN A. ROBB, *Minority Staff Director*

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

CHARLES E. GRASSLEY, Iowa, *Chairman*

STROM THURMOND, South Carolina
HANK BROWN, Colorado
MIKE DEWINE, Ohio

HOWELL HEFLIN, Alabama
HERBERT KOHL, Wisconsin
RUSSELL D. FEINGOLD, Wisconsin

KOLAN DAVIS, *Chief Counsel*
WINSTON LETT, *Minority Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

CHRONOLOGICAL LIST OF WITNESSES

ALPHABETICAL LIST AND MATERIALS SUBMITTED

APPENDIX

Proposed Legislation

Questions and Answers

ADDITIONAL SUBMISSIONS FOR THE RECORD

VOLUNTARY ENVIRONMENTAL AUDIT PROTECTION ACT

TUESDAY, MAY 21, 1996

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:03 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Grassley (chairman of the subcommittee) presiding.

Also present: Senators Brown and Kohl.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. It is my privilege to call the hearing to order and to say good afternoon to everybody, including members who are here on this very important subject. So I thank everybody for going out of their way to help make the legislative process work, particularly on this bill, S. 582, which is the Voluntary Environmental Audit Protection Act, and, of course, the issues that it involves of providing incentives, including immunity privilege and penalty mitigation for environmental audits and voluntary disclosure.

Before we start this hearing, I would like to say a few words about the bill. The bill was originally introduced March 21, 1995, by Senators Hatfield and Brown, and it is basically the product of two different versions of a privilege, first enacted by Colorado and Oregon, protecting company-implemented environmental audits and voluntary disclosures of violations found during those audits.

Currently, 17 States have adopted some version of this environmental audit privilege. The privilege is an effort to codify a self-evaluation privilege, which recognizes that companies should be encouraged to evaluate themselves and not be fearful that the results of their self-evaluations will be used against them. States have either enacted a privilege to keep audit information confidential where a company acts in good faith, or a privilege that protects a company from penalties when it has discovered violations during a self-audit, but voluntarily discloses noncompliance and promptly undertakes corrective action.

Some States have enacted legislation which adopts both privilege and disclosure immunity protections. Although I haven't yet taken a position on S. 582, the idea behind the privilege/immunity concept appears to be a creative way to maximize enforcement dollars,

encourage self-policing, and make compliance more effective. Successful environmental audit programs are the result of a shared goal by industry and the regulator in improving environmental quality. I will be interested in hearing more on the policy arguments behind the bill, as well as how both industry and the regulator believe is the best way to promote what appears to be a common goal.

However, S. 582 as drafted raises a number of questions that I would like to discuss. They regard what may be subject to privilege and when immunity may be invoked by companies. One of the issues I am particularly concerned with is that the bill as currently drafted could possibly provide immunity in cases where companies or individuals have intentionally or willfully violated environmental regulations, or have recklessly endangered public health and the environment.

Another issue that I have questions about is the extent to which documentation and communications associated with environmental audits are entitled to protection. I am sure the sponsors agree that these problems in the bill will have to be addressed.

Additionally, the Environmental Protection Agency, which is here before us today, has recently promulgated its final environmental audit disclosure policy. This final policy has also recognized the legitimacy of qualified protection for audit reports and voluntary disclosures. I am interested in hearing from EPA and the Justice Department about how their policy of limited penalty mitigation has been working and whether it has been successful in getting businesses to self-audit, voluntarily disclose noncompliance, and also promptly correct violations.

I am also interested in what EPA's position has been regarding the adoption by individual States of environmental audit privileges and immunity policies and to what extent that has affected EPA's approval of State programs to enforce Federal environmental laws.

Last, I think that we are all here to recognize that the States have sent us a very strong message that they want to help companies become better corporate citizens through the adoption of statutorily defined incentives, such as those set forth in S. 582. We now need to determine the best course to achieve our environmental goals and that is why this hearing is being held.

Senator Kohl.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you very much, Chairman Grassley. We should do all we can to encourage business to consider the environment, and environmental audits are part of that. These audits are sound business practice. With them, companies can monitor their compliance with often complicated Federal environmental regulations and after the audit they can correct the problem.

This is good corporate citizenship, and we all recognize that responsible American corporations do genuinely want to comply with the laws. The only question is how we can better encourage this kind of auditing. When Senators Brown and Hatfield introduce legislation with that goal in mind, we have to pay close attention to

what they propose. But before we move this measure forward, we still need to answer several questions.

First, is there a real need for this legislation, especially in light of current efforts by the EPA to encourage audits? Second, does the proposed legislation go too far in search of a solution? In other words, does it, in fact, strike the proper balance?

Finally, many States have already begun to experiment with this kind of legislation, but they have only just begun and we cannot yet tell which approach, if any, will work best. In contrast with these State efforts, the Federal legislation that we are considering gives companies guarantees, privileges, and immunities that go far beyond what any State has done. So while we want to protect companies from excessive penalties for performing environmental audits, we may not be quite ready to know what the proper balance should be.

We look forward to hearing from our witnesses today. Tom Gehl is here from Kohler, WI, and Kohler is one of our State's most respected businesses. Kohler also developed Black Wolf Run, one of our country's top 10 public golf courses today, and I mean to get there this summer.

Lois Schiffer of the Department of Justice is an esteemed environmental lawyer who has the added virtue of having a sister who lives in Milwaukee, so we welcome you, too. We look forward to working with all of you on this issue.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you. We have a statement from Senator Thurmond which we will insert in the record at this point.

[The prepared statement of Senator Thurmond follows:]

PREPARED STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Mr. Chairman, thank you for holding this hearing on "S. 582 and Voluntary Environmental Audits" to address this important issue. It is hard to imagine that any reasonable person would oppose providing incentives in the law for companies to voluntarily take actions that they otherwise would not take in order to protect and improve the environment. All of us wish to preserve and enhance the environment, although there may be differences in the methods proposed.

The challenge of course is to work through the details to ensure that S.582 or similar legislation achieves that goal. Fortunately, we have precedent to follow which has been established by a number of States. Seventeen States have enacted legislation on this issue. The relevant Federal agencies seem to be taking the paternalistic view that they know what is best for the States. However, I look forward to hearing today from States that have practical experience with legislation to encourage companies to voluntarily audit their operations, report to the government, and most importantly, promptly correct any problems. We must remember that the ultimate goal is not to point fingers and assign blame when people are doing everything they reasonably can, but to achieve a cleaner and healthier environment for our children and grandchildren.

I look forward to working with the proponents of this legislation, to ensure that its laudable goals are achieved.

Thank you.

Senator GRASSLEY. I think we will start now, even though Senator Brown isn't here. Senator Hatfield is here. Senator Brown and Senator Hatfield are the initiators of this legislation, and they also have the experience of their own individual States being in the forefront of the passage of such legislation. Certain aspects of S. 582 mirror what has been done in their respective States.

So, Senator Hatfield, I welcome you and thank you for your interest in improving this situation, and we will listen to your testimony.

STATEMENT OF HON. MARK O. HATFIELD, A U.S. SENATOR FROM THE STATE OF OREGON

Senator HATFIELD. Thank you, Mr. Chairman. Mr. Chairman, you have outlined the background of this legislation. I might just briefly highlight again the fact that in 1993—I would ask that my full statement be put in the record and I will just highlight it.

Senator GRASSLEY. Your entire statement will be placed in the record.

Senator HATFIELD. In 1993, the State of Oregon, really building on the experience of OSHA, saw fit to adopt a self-audit plan and put it into effect. This was under the administration of Governor Barbara Roberts and Ted Kulingasky, who was the attorney general, and Fred Hansen, who was the director of the Department of Environmental Quality. Fred Hansen is today the deputy administrator of the department here in Washington headed up by Carol Browner, EPA.

So these three, under Democratic administrations, supported by Republicans and Democrats in the legislature, so it was a bipartisan effort—the Oregon Association of Industries, which is predominantly Republican—put together this particular proposal in 1993. Colorado followed a year later, in 1994, and in 1995 I introduced the first bill here in the Senate to imitate the Oregon plan.

I would only just as a side remark say that all of the great Federal legislation that deals with regulation and other objectives really was initiated by the States on an experimental basis, certainly in the spirit of the true concept of federalism. Social Security, unemployment compensation, industrial accident, women's rights, children's rights, and many other pieces of legislation were tested by the States, and this is another example that was tested in this case by my State of Oregon and Colorado, Senator Brown's State.

I referred to OSHA from the standpoint that when OSHA was adopted, I happened to be in the Senate at the time. We put into an adversarial relationship with the very objectives and goals it was seeking to achieve and to be implemented through private industry. In other words, it was a regulatory fine concept. We are going to regulate and we are going to, in effect—when we make our inspections, it is going to be a fine because any kind of an inspection that was conducted or was requested by a business to make certain they were in compliance with the regulations of OSHA called for an immediate fine.

We in the Congress decided that was not seeking and achieving the objectives we had intended to achieve under OSHA, so we put it back into a cooperative, collaborative rather than an adversarial relationship between the regulator and the industry. I might say that Oregon was the first State in the field of industrial accident to say that it is not an exclusive responsibility of management, and that was nationally the whole concept. That was a management issue.

We created the idea that it was management and labor and the public working collaboratively to make a safer workplace, and we

achieved the highest safety records in the Nation out of that concept of collaboration and cooperation, rather than adversarial, reaching to a fine or some kind of a punishment.

So with that background, Oregon felt it was the time to adopt a collaborative, cooperative approach between, in this case, the regulators relating to environmental standards and quality—and Oregon, I think, has taken no back seat to any of the States—none of the 49 States, other than Oregon, in being a leader, a trailmarker on environmental legislation, starting in 1911 in my State.

So, consequently, we were able to achieve the results of this at the State level with a good record of that. Now, as you indicate, 16 other States, a total of 17, have adopted some form of this kind of self-audit, and it is pending in 25 other States that that will be taken up during this legislation session year or the next legislative session of those States.

I want to say that as we seek to regulate, we always find expansion and experience to the point where it leads more to confusion and oftentimes to overlapping, duplicating, et cetera, rather than to the objectives of a better environment, in this case of regulations. Do you realize today that the regulations involving environmental protection and regulations in environment in general are larger than the Tax Code of the United States? So, consequently, it has expanded and grown, and complexities are just extremely confusing today.

I want to make it very clear that this is a very complex issue, Mr. Chairman. The environmental self-analysis is a very complex venture, and I would not come here today and say to you that it is a simple matter at all. This committee has a tough job ahead. I don't think this bill is the final version. In fact, I know it isn't. I would be concerned if you accepted it as a final version. There are many questions. You have posed a few, but there are many more questions that have to be considered and supplemented or in place of certain language of the bill.

Let me tell you basically that this kind of environmental audit that we have experienced in my State of Oregon—if there is any indication of fraudulent assessment in terms of escaping the regulation, that totally negates the client relationship that we have established between doctor and patient and lawyer and client, et cetera, that we express here between a self-audit and what can happen with it.

It cannot be used to prosecute in a court later on. It is privileged between the company that is doing it and the regulators. But this is only at the State level, and therefore it is only half a loaf at this point and I think it is important, then, for the Federal Government to consider it, especially with the growing complexity of our Federal regulators and their rules.

I think improvement has to be made to this bill. I don't think there should be any kind of indication that we are giving less attention or that we are giving more leeway to pollute or to harm the environment. That is not the purpose of the bill. It is very clearly a bill to expedite the regulatory process into full implementation through the collaborative process rather than through the adver-

sarial complex that we now find ourselves in. It is an increasingly onerous burden to the regulators as well.

I want to indicate that, as I say, Fred Hansen, who is the Deputy Administrator of EPA today, was a party to and had, probably more than any other person, direct involvement in drafting the Oregon bill. Yet, at the same time, we are learning in the State through this experience, as I am sure any of these other States will learn as well. I would like to see you get the record of all the States that have some form of this and to distill that experience, much like I would have preferred to see 50 States go out on a complex health program, and encourage and subsidize those States that were not able to do so immediately—my State of Oregon has adopted one of the most progressive of all comprehensive health care programs—and let the States experiment with these systems and these various concepts, and then distill that experience to find out what the Federal role should be.

So these are the parallels that I want to draw because we have not found the ability to draw yet a comprehensive health program that is going to be implemented in this country. I frankly feel that if we have the foresight, we would encourage those States like my State and many other States to get that kind of experience behind us. I would hope you would base any of your considerations on the composite of experiences of those States that have this in effect.

I think also I might speak as an appropriator. We have been through a process of the 1996 fiscal year that has not been one that any of us has enjoyed. I hope we can avert it in the 1997 cycle that we are embarking upon now with the budget resolution process. But I want to say that one of the problems we had with the White House and one of the problems we had with the House and the Senate in conference was funding the EPA at a level at which it could perform its duties and its mission, and I do not see that those funds are going to be more. In fact, we are fighting at the moment this current resolution on the floor of the Senate that came out of the Budget Committee which put us about $7 billion under the appropriated level of 1996 that took us 7 months in order to achieve resolution on.

Therefore, at this point in time, this is an unrealistic budget resolution on the floor. I will do everything I can to defeat it because I am not going to be forced into the position as the chairman of the Appropriations Committee to go through that long process because the same issues that held us up 7 months into the 1996 fiscal year are present in this current budget resolution.

I am happy to say that working with Senator Domenici and his staff, they recognize this problem and we have already been able to cut that gap in half and are working to try to keep the level of funding for 1997 at the appropriated level, not the resolution level of 1996, but the appropriated level of 1996, in order to avoid the EPA issue and the education issue and many of the others that held us up over this time.

So I merely want to say that with this increasing burden upon EPA, it is going to have to have a broader base of implementation than what it has had in the resources to implement those rules and regulations at this time, and I believe it can be done with the kind of collaboration with the States and with industry.

I would like to close by just saying that there are differences as between the State of Oregon and the State of Colorado. We have incorporated the two here, but again I want to make certain that there is no desire to pollute with impunity. There is no desire on my part in this bill to try to lower the standards. There is no effort on this to make it more elusive to enforce the requirements or the standards, but only to enhance those rules and regulations and the ability to see them adopted sooner than later. I think that can be done much better with a lure than with a club, and I think the incentive and the collaborative effort can achieve that much faster.

I have highlighted my statement and I am happy to respond to your questions.

[The prepared statement of Senator Hatfield follows:]

PREPARED STATEMENT OF HON. MARK O. HATFIELD

Mr./Madam Chairman: Thank you for scheduling this important hearing and for allowing me to testify before you today.

Over a year ago, Senator Brown and I introduced legislation to provide incentives for companies to conduct environmental audits and take action to address any problems they find in the process. I want to thank Senator Brown for his partnership with me on this thought-provoking matter.

As is true for so many significant policy debates in this country, we have Oregon innovation to thank for the origination of this idea. In 1993, Oregon became the first state to enact an environmental audit privilege. Since that time, a number of states have followed suit with audit protection legislation of some kind.

Colorado is one of the states that also has a law to encourage and protect environmental auditing. Colorado's law goes further than Oregon's by allowing a company to voluntarily disclose the contents of its environmental audit and avoid penalties, if certain conditions are met. In cooperation with Senator Brown, I have included these provisions in the legislative proposal now pending before this Committee in Senate bill 582.

Mr. Chairman, encouraging environmental self-analysis is a complex policy venture. We will need the full resources of this Committee and the Administration to unravel all the difficult issues presented by this subject. Many improvements are in order to the pending legislation.

It is difficult to have a conversation these days with a business leader or a local government official without the topic turning to the increasingly onerous burden of federal regulations—particularly code of environmental regulations which now takes up more space and is more complex than the tax code. It is now clear that many of our laws and regulations designed to ensure a safer environment are now having the unfortunate effect of discouraging sound environmental practices.

I believe environmental regulators should encourage responsible actions by businesses with incentives and flexibility, rather than through threats and penalties. As one who is familiar with federal financial realities, I can report that the resources available for environmental enforcement and monitoring are limited and not likely to increase. It is vital that companies self-police and be willing partners in implementing our national environmental programs.

I want to take a moment to compliment EPA on its initiative in this area. On this issue, EPA has engaged in its own form of audit—an audit of the legal, regulatory, public, and political environment. The agency has developed a record and a course of action. I have reviewed the recent EPA policy and believe it is an important step. This is a difficult question for those regulators accustomed to a particular approach to environmental compliance.

We are to here to struggle with the question of how much encouragement is necessary. Some will say that current law, enhanced by EPA's new policy, is sufficient. Many are not convinced that it does enough. Oregon and other states have determined that a statutory privilege is necessary, with the State of Colorado and others believing protections from voluntary disclosures are needed to sufficiently entice companies to audit. I am vitally aware that we face a danger in providing too much protection for environmental audits. It is not my intention to provide loopholes for companies that seek to pollute with impunity. So we are in search of the elusive balance sought in so many environmental issues today.

Thank you again, Mr. Chairman, for providing this forum for an issue. I look forward to working with the Committee as it considers this legislation.

Senator GRASSLEY. Senator Brown, do you want us to ask questions of Senator Hatfield or have you testify?

Senator BROWN. Well, my hope is you will give Senator Hatfield the third degree in some depth. [Laughter.]

If it be permissible, Mr. Chairman, I might make just a few quick comments to add to it.

Senator GRASSLEY. Go ahead.

STATEMENT OF HON. HANK BROWN, A U.S. SENATOR FROM THE STATE OF COLORADO

Senator BROWN. I am not sure that I can add to the eloquent statement that has been made before you, but I wanted to emphasize a couple of thoughts. One was this. There has been some discussion of an element that environmental issues might polarize Americans. The truth is we all have an enormous amount to gain from strong and full enforcement of our environmental laws; that we all have an enormous amount to gain, whether it is a company producing a product or a citizen enjoying our marvelous environment, that comes from seeing that these laws are fulfilled and that indeed we go further than what the laws involve; that we engage in as many positive acts as we can to improve our environment.

What this bill is about is trying to find ways to encourage greater compliance with our environmental statutes and engender positive thinking about additional things we can do. What I wanted to simply emphasize for the committee—I know the members are familiar with it, but there are three things that need to be emphasized.

One is that the protections of S. 582 are not intended to apply to environmental bad actors. The discovery of evidence under the exclusions of S. 582 are not applicable to entities asserting such disclosure protections for fraudulent purposes. So if they have been involved in fraud or they are a bad actor, these protections don't apply.

The audit report disclosure protections against admissibility don't apply to information required to be collected, maintained or reported by a regulated company to the appropriate Government agency pursuant to our laws. Disclosures and evidentiary protections applicable to an environmental audit performed in good faith with all the other conditions of S. 582 will not shield—let me repeat—will not shield those documents or information already available from independent sources or observations, sampling or monitoring of the appropriate Government agency.

An understanding of those factors, I think, is fundamental for understanding this bill because this bill is not about stopping the enforcement of environmental laws. It is about enhancing the enforcement of environmental laws, and bad actors are simply out in the cold. This bill offers them no relief at all. What this bill does is try and encourage people to take the extra step to comply, and to comply promptly.

My sense is that, tragically, there are a number of violations of our environmental statutes that don't get reported, that don't get addressed, where prompt action isn't taken, and I think this bill can be of help in those areas to ensure much prompter action and much fuller action.

Thank you, Mr. Chairman.

Senator GRASSLEY. Thank you. I have a letter that was sent by 16 House members, all Democrats, to Vice President Gore in support of the proposition that we ought to be working toward audit protections. I only say this because you are both Republicans who are on the first panel, and I think that this letter indicates bipartisan support.

I am going to ask you to comment on a statement because it appears that the administration and others are trying to make this a political issue. Later on in the hearing, we are going to have one witness who is going to testify that the legislation would actually attract bad actors and allow critical evidence to be buried, and that this is really not an environmental bill, but it is really a "judicial bill." Additionally, opponents say that the privilege immunity provided in the bill would not allow the Government to act to protect the environment in emergency situations.

So it is those two things. If you could respond to them, I would appreciate it.

Senator HATFIELD. What was the first, other than the emergency?

Senator GRASSLEY. The first one deals with the fact that, you know, if you really had some bad actors, they could take advantage of this legislation and allow evidence to be buried. So they would say that this really isn't an environmental bill to promote good environmentalism or good ecology; it is to promote protection for bad actors.

Senator HATFIELD. Well, I want to repeat, as I indicated, that there is no way that we have in any way tried to draft a bill that would provide a loophole for bad actors or for continued pollution, but even settle on a fine. I can remember those arguments were argued out 20, 30 years ago on the matter of taxing polluters. But in the idea of taxing the polluters, you are implying that you have a right to pollute as long as you pay a tax, and we rejected that in my State. We said we want these regulations implemented and we want them enforced.

So my point is we are going after the pollution and there is no change in that objective in this bill. Now, if it can be tightened up with language—I am not a lawyer, but nevertheless if we can put stronger language or rephrase the language to make that point clear and unassailable, I support that kind of improvement. I indicated to you I think this bill does need, as it is now introduced, certainly to be reviewed for all of these questions that are legitimate questions.

I think, second, the emergency situation—we always ought to have some kind of an emergency effort to recognize we can't predict every situation that is going to come along. If we could, we would write perfect laws, but we don't write perfect laws. So if there is something here that should include an emergency exemption or an emergency trap door or steam valve, or whatever it is, I would support that.

I want to also say that you have referred to the letter from the Democrats in the House. Let me indicate, too, the EPA now has an administrative procedure that is doing self-auditing in their own area, their own environment, the regulatory, the legal, the public and the political environment. So they are assessing this situation,

I think, which indicates again a flexibility factor that the agency is adopting, realizing it has to get a broader base of people working together to achieve these goals because they will never achieve them themselves dealing with the numerical number of industries and organizations they have to oversee or they have to enforce.

Senator GRASSLEY. Senator Kohl.

Senator KOHL. The only question I have relates to what I think both of you are talking about, and that is do you think that there is enough information now available with respect to the legislation that occurs now in about 16 States, as you have suggested, in the very recent past on this whole process—do you think there is enough experience available, Senator Hatfield and Senator Brown, for us to enact Federal legislation at this time, or wouldn't we be better off considering what is happening in the States and allowing several other States to enact their own legislation and then coming together in a year or two or three from now to see what really works before we attempt to enact Federal legislation?

I think you have indicated yourself, Senator Hatfield, that the legislation that we are looking at right now is not the legislation that is likely to ever pass, and I think what I read into your comment is that you have some questions in your mind about what Federal legislation should look like at this time in view of the limited experience that we have had at the State level.

Senator HATFIELD. I would say that unlike the health situation—because we didn't have in place a number of State health programs to draw experience out of, that became a national issue that has been pretty well excluded to national regulation and roles through HCFA and other Federal agencies. Oregon wanted to go out on its own and test a health plan. We had to get waivers from the Federal Government in order to do that.

We now have States, like Oregon and Colorado, that have a collective of about 6 years of experience, ours starting in 1993, Colorado in 1994. I think what we need, though, is to strengthen those States already out there, even with the limited experience, because a State program alone is not going to give them the full opportunity to implement the flexibility and enforcement than if we had a Federal—and I am not asking for waivers, as we might do if we wanted that, but to have a Federal complementary role as it relates to the EPA working with the DEQ's, Department of Environmental Quality that we call it in our State.

I think you can't separate pollution today. We found that in the acid rain that came down from Canada and covered many States. So no one State can really deal with the environmental issues today of the Columbia River that goes through four States and Canada or these other things that relate to pollution of today. Ocean pollution covers all the Pacific States and Alaska. These are things that have not let themselves be restricted to a State action because it demands Federal and many times international action.

So I think we have a pretty good outline here. What I am saying is it can be improved upon, and I think you can improve upon it by reviewing those States that have enacted it and how they differ, say, from Oregon and Colorado that led the trail. But I do think with the pollution issues we are dealing with now, we can't restrict

them to a single State, no matter how desirous that State is to deal with the issue.

Senator BROWN. Mr. Chairman, if I might also follow up?

Senator GRASSLEY. Go ahead.

Senator BROWN. My own sense is that this bill is so carefully written that I think it will prove to be a very positive experience because it will generate new information for us in terms of enforcing the environment that we simply don't have right now.

For those who have concerns, I hope they would read the exclusions under paragraph 2. Basically, it is "any document, communication, data, report, or other information required to be collected, developed, maintained, or reported to a regulatory agency pursuant to a covered Federal law." It also exempts from the exclusion information obtained by observation, sampling, or monitoring by any regulatory, or information obtained from a source independent of an environmental audit. In other words, basically, information that is capable of being admitted now and used is still available.

This is a heads the environment wins, tails the antienvironment groups lose kind of law. This is a plus/plus kind of law because what it does is generate new information to help enforce our environmental concerns without jeopardizing any of the evidence that now can be used to enforce the law.

Senator GRASSLEY. I thank you, Senator Hatfield.

Senator HATFIELD. Thank you.

Senator GRASSLEY. We will go now to the second panel. There is Steve Herman, Assistant Administrator of the U.S. Environmental Protection Agency, specifically from the Office of Enforcement and Compliance Assurance. Then our second witness on the second panel is Veronica Coleman, U.S. attorney for the western district of Tennessee. I welcome you to this hearing, and I know that you have been informed by staff of a 5-minute time limit.

Also, I want to assure this panel, as well as every panel, that written statements will be put in the record, unless you don't want it put in, but we will just assume you do want it put in. So you don't have to ask for permission to do that, and so then summarize accordingly.

Mr. Herman, we will start with you.

PANEL CONSISTING OF STEVEN A. HERMAN, ASSISTANT ADMINISTRATOR, OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, WASHINGTON, DC; AND VERONICA COLEMAN, U.S. ATTORNEY, WESTERN DISTRICT OF TENNESSEE, MEMPHIS, TN, ACCOMPANIED BY LOIS SCHIFFER, ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

STATEMENT OF STEVEN A. HERMAN

Mr. HERMAN. Thank you very much, Mr. Chairman. I would just say by way of introduction that I bring you greetings from my uncle in Maquoketa, IA, who has been there for a long, long time.

Senator GRASSLEY. I assume you go back there now and then.

Mr. HERMAN. Yes, we visit.

Senator GRASSLEY. A beautiful part of my State.

Mr. HERMAN. Yes.

Thank you, Mr. Chairman, for the opportunity to testify about how we can encourage voluntary compliance without compromising environmental enforcement. I would like to make three points in my oral statement.

First, EPA already has a policy that is working to encourage companies to audit, disclose, and correct violations, and that does not rely on secrecy or blanket immunity.

Broad amnesty and privilege laws as provided under S. 582 would reduce deterrence and make it difficult, and sometimes impossible to investigate both civil and criminal violations.

Finally, compliance with environmental law is a duty, not an act of charity. I think the public expects the regulated industry to assume that responsibility. If we give in to endless pleas for special treatment, we will invite public cynicism instead of the trust needed to make compliance incentives work.

Let me begin with EPA's self-disclosure policy. We have already substantially reduced or eliminated penalties for companies that audit, disclose and correct violations. We have also made clear that we will not prosecute companies in these circumstances absent outrageous conduct on the part of their management.

That policy was developed after close consultation with State officials, public interest groups, and industry. It has won praise from the Chemical Manufacturers Association, the Sierra Club, and a bipartisan group of 19 State attorneys general and environmental commissioners who said in a letter of support:

> The policy is a carefully constructed compromise that balances the legitimate interests of the public, regulated entities, and Federal and State enforcement agencies. The consultative model used in developing the policy provides an excellent example of how EPA and the States work in harmony to encourage both voluntary compliance and effective law enforcement.

The policy, I might add, is more than an abstract idea. It is a real program that is actually working. We have had over 65 companies disclose violations since the policy took effect. We have already settled 15 and we are moving on many others. We have established a steering group to review disclosure cases and will publish the decisions we reach to provide the industry with guidance and certainty. With our policy in place, responsible companies have no reason to hide from the public or the Government.

We oppose S. 582 because, despite the very laudable intentions of its sponsors, Senator Brown and Senator Hatfield, it would cripple environmental law enforcement and the public's right to know. The broad and extremely vague evidentiary privilege it would establish would force us to spend precious resources fighting in court over access to evidence. In one way, we will be increasing litigation rather than decreasing it.

Litigation costs, however, are not our only concern. Most of our criminal investigations begin with tips from confidential informants. With a privilege in place, we face a Hobson's choice: Act on the information and hope that it and all succeeding evidence, the fruit of this information, won't be thrown out later, or go to court to find out if the evidence can be used, which means notifying the target and possibly blowing the informant's cover. In other cases, we wouldn't be able to get or use evidence showing that a defend-

ant had knowledge of requirements, was negligent in failing to prevent a violation, or contributed to a Superfund site.

No wonder the privilege is so adamantly opposed by a bipartisan coalition of State attorneys general that includes Republicans like Grant Woods of Arizona, Deborah Poritz of New Jersey, Dennis Vacco of New York, as well as Democrats such as Hubert Humphrey of Minnesota, Scott Harshbarger of Massachusetts, James Doyle of Wisconsin, and Tom Udall of New Mexico, currently the head of the National Association of Attorneys General. No wonder the courts have rejected efforts to expand the narrow privileges recognized in law today, finding that privileges are, in the Supreme Court's words, "in derogation of the search for the truth."

We have also opposed and will continue to oppose State legislation that deprives the State agency and other State officials of the ability to carry out Federal requirements. Our review is limited to ensuring that such legislation meets minimum standards that we are required by law to maintain so that protection under Federal law does not depend on where one lives. These include the ability to bring injunctive actions, adequate criminal authority, and the ability to recover penalties under the circumstances set forth in our policy and in the statutes. Perhaps most important, privileges destroy the kind of trust needed to build confidence in industry's ability to police itself.

Finally, complying with environmental laws is no different than complying with tax, banking, insurance, or any other Federal statute. It is a requirement of citizenship and it means that, like the rest of us, companies must ultimately be held accountable for their actions.

Our self-disclosure policy preserves EPA's right to collect penalties for violations in limited circumstances. They are those that result in serious harm or risk, that reflect repeated noncompliance, or allow violators to gain an economic advantage over law-abiding competitors in the marketplace. In addition, individuals must answer for their own criminal conduct and corporations for any deliberate attempts to conceal or turn a blind eye to violations. These conditions are consistent with our environmental statutes and most are contained in the penalty guidelines for small business audits in the new Small Business Regulatory Enforcement Fairness Act.

We believe responsible companies should be expected to live within these guidelines. To be told that some companies will refuse to audit unless guaranteed amnesty for their own misconduct or licensed to withhold evidence from the Government is a form of blackmail and should be rejected for the special-interest pleading that it is.

I would like to close by reflecting on remarks made by one of the attorneys general at last week's conference in Albuquerque. Grant Woods of Arizona, who led the fight against the privilege and immunity legislation in Arizona, asked,

> How can we insist that individuals from impoverished backgrounds accept greater personal responsibility, stand up for their own behavior and take the consequences, while legislating new excuses for those who enjoy all the advantages?

I think we need to answer that question, Mr. Chairman. Many in Congress have argued for significantly narrowing the so-called exclusionary rule to make it easier, not harder, to obtain evidence

of criminal conduct. How can we explain legislation that would make it harder to get such evidence when the crime is against the environment or public health and the defendant is a corporate actor?

We pride ourselves on one standard of justice for all in America. It is the law in this country that makes us great and it should not and does not need to be changed in this context.

Thank you very much.

[The prepared Statement of Mr. Herman follows:]

PREPARED STATEMENT OF STEVEN A. HERMAN

I. INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to testify on how we can provide incentives for businesses to find, disclose, and correct violations—without compromising the enforcement of our environmental laws. I want to start with four propositions that reflect the environmental enforcement policy of this Administration:

First, achieving compliance means that both government and industry must accept certain responsibilities. Government should give credit to good faith efforts to comply, without compromising its ability enforce regulatory requirements firmly and fairly. EPA's audit policy substantially reduces or eliminates penalties for violations that are disclosed and promptly corrected, and is already working to encourage compliance. Legislation that guarantees sweeping amnesty and promotes secrecy will damage both the creditability and the effectiveness of our enforcement program, and in the end undermine the integrity of incentives for responsible business.

Second, regulated industries earn the public trust by demonstrating a commitment to stay in compliance, and by being open with both government and the public at large. Compliance with environmental laws—like tax laws, banking laws, and other federal statutes—is a binding obligation. It is not an act of charity or something we do only when it is convenient or inexpensive. While we may disagree about the wisdom of a particular statute, it is the law until changed, and ought not to be subverted by making it cheaper to avoid compliance or harder to detect violations. Responsible companies are willing to meet their obligations forthrightly, and without constant pleading for special treatment.

Third, the enforcement of federal law—whether carried out by states or EPA—ought to be subject to some minimal national standards. Otherwise, it is no longer federal law. If it is cheaper to violate the law in some states, then companies that operate legally in neighboring jurisdictions will be put at a disadvantage.

And fourth, any effort to develop compliance incentives must reflect common ground. The Clinton Administration has worked hard to accommodate the regulated community's legitimate interests in incentives for compliance. But we must reconcile industry's viewpoints with the concerns of the public and those federal, state, and local officials who enforce the law. EPA's policy has won praise from the Chemical Manufacturers Association, the Environmental Defense Fund, and federal, state, and local law enforcement officials. In contrast, blanket immunity and privilege legislation has proved divisive and is opposed by law enforcement agencies and public interest groups.

II. RESPONSIBILITIES OF GOVERNMENT: INCENTIVES FOR COMPLIANCE AND A CREDIBLE ENFORCEMENT PROGRAM

Incentives for compliance

EPA's new policy on Incentives for Self-Policing, announced in December of last year, clearly distinguishes between those who recognize their responsibility to stay in compliance, and those who do not. Under the policy, companies who disclose and correct violations will not pay any gravity-based (or punitive) penalties. Nor will they be subjected to any threat of criminal prosecution, so long as the corporation has not engaged in egregious misconduct. EPA's policy extends to those violations discovered through compliance management systems, as well as periodic environmental audits. While announced last September, we actually made the policy available as an interim step last April, so it has been in effect for over a year.

The policy includes some important protections. It does not apply to violations that reflect repeated noncompliance, result in serious harm or imminent and substantial endangerment to human health or the environment, or allow a company to profit from its noncompliance at the expense of its law-abiding competitor. Nor does

it excuse individuals for their own criminal conduct, or companies that deliberately conceal or turn a blind eye to violations. We think these protections are grounded in both law and common sense, and would strike most people as reasonable. Most of these criteria are explicitly referenced in the Small Business Regulatory Enforcement Fairness Act, which recognized that legislating total amnesty to encourage auditing was neither wise, necessary or fair.

Will these limited exceptions discourage auditing, disclosure and correction by responsible companies? We don't think so. The Chemical Manufacturers Association, for example, has said:

"We believe the new policy will substantially promote the use of environmental auditing and compliance management systems. It should also lead to greater willingness to disclose noncompliance discovered through these activities. The result will be greater environmental protection through the prevention of noncompliance, as well as greater public awareness of regulated entities' compliance status and efforts."

We are extremely heartened by the positive response we have had from both states and the regulated community to our new policy so far. California and other states have essentially adopted our guidelines for their own use. So far, 65 companies have taken advantage of our invitation to disclose and correct violations, with 15 cases settled to date. We think the response demonstrates that EPA's policy is working, and we will be pleased to submit additional documentation for the record.

Under EPA's self-disclosure policy, responsible companies should have nothing to fear and nothing to hide from government. We believe that policy should be given a chance to work, and not be preempted by legislation that would increase litigation, burden the courts, frustrate law enforcement, and make the public even more cynical and distrustful of both government and industry.

Credible enforcement is impossible when evidence is hidden

It is clear that the public expects us to fairly and vigorously enforce violations of environmental law. Incentives for compliance do not have to come at the expense of enforcement, which is just as critical to environmental law as it is to tax, banking, securities, health and safety laws, and other statutes that protect the public welfare. The theory of deterrence is well accepted and understood by the public: encourage desired behavior with sanctions for undesired conduct.

Providing an evidentiary privilege that would allow companies to throw up new roadblocks to government investigations, and to conceal evidence of criminal misconduct, will not allow us to fulfill the public's expectation that we enforce environmental laws. We believe our audit policy provides positive incentives to act in the right way without compromising enforcement.

Audit privileges undermine enforcement and the public's right to know

We oppose S. 582 because, despite the laudable intentions of its sponsors, it would cripple environmental law enforcement and the public's right to know. The broad and extremely vague evidentiary privilege it would establish would force us to spend precious resources fighting in court over access to evidence. That will result in a reduction in our overall enforcement effort.

Litigation costs are not our only concern. Most of our criminal investigations begin with tips from confidential informants. With a privilege in place, we face a Hobson's choice:

Act on the information, and hope that it and all related evidence won't be thrown out later, or

Go to court to find out if the evidence can be used, which means notifying the target and revealing the nature of the investigation, which could destroy the informant's cover.

In other cases, we might not be able to get or use evidence showing that a defendant had knowledge of requirements, was negligent in failing to prevent a violation, or contributed to a Superfund site.

No wonder the privilege is so admanantly opposed by a bipartisan coalition of state attorneys general that includes Republicans like Grant Woods of Arizona, Deborah Poritz of New Jersey, and Dennis Vacco of New York, as well as Democrats such as James Doyle of Wisconsin, Hubert Humphrey of Minnesota, Scott Harshbarger of Massachusetts, and Tom Udall of New Mexico, currently head of the National Association of Attorneys General. No wonder the courts have repeatedly refused to expand the privilege concept beyond the narrow limits in existing law, finding them to be, as the Supreme Court has said, "in derogation of the search for truth."

Perhaps most important, privileges destroy the kind of trust needed to build confidence in industry's ability to police itself.

III. WHAT ARE INDUSTRY'S RESPONSIBILITIES?

Let us move next to the question of industry's responsibility to stay in compliance with the law. Over the past decade, environmental auditing has exploded, to the point where it is now standard practice for between 75% and 85% of companies, according to industry-wide surveys by Price-Waterhouse, Price Anderson, and the Investor Research Responsibility Center, Among highly regulated sectors like petroleum refining and chemical manufacturing, environmental auditing is virtually a uniform practice. This phenomenal growth in environmental auditing has taken place without a special act of Congress. Why? Because auditing is a sound business practice, and most companies recognize that it is in their self-interest to find and correct problems before they are discovered by government inspectors.

With our self-disclosure policy, we have made clear that companies that are auditing for violations and correcting and reporting any found need not fear gravity-based penalties or criminal prosecution. But we are reserving our right to collect penalties where violations: result in serious harm or imminent and substantial endangerment; reflect repeated noncompliance; allowed the violator to gain a substantial economic benefit from noncompliance; or resulted from an individual's criminal conduct.

I think the public expects companies to admit their mistakes and pay their penalties in these kinds of circumstances. To take just one example, ordinary middle income taxpayers understand that if they pay their taxes late, they face penalties and interest. Otherwise, who would have an incentive to pay their taxes on time? By the same logic, we ask businesses who find they are out of compliance to pay penalties in order to compensate for any economic advantage they have gained over their competitors. Why should corporations be held to a lower standard than ordinary taxpayers?

Similarly, we have heard repeatedly that companies need audit privileges so they can have candid internal discussions about noncompliance. We think companies also have an obligation to be candid with both the public and the law enforcement officials who are asked to represent them. A privilege—which throws a shroud of secrecy over compliance behavior—promotes distrust instead of openness. Ironically, the Price-Waterhouse study documents that privilege is a solution in search of a problem. That survey indicated that companies that do not audit are not primarily concerned about confidentiality. Among companies that audit already, the kind of penalty incentives developed through EPA's policy were identified as at least as important as an audit privilege in encouraging expanded self-policing.

IV. STATE ENFORCEMENT OF FEDERAL LAW SUBJECT TO MINIMUM STANDARDS

EPA is required by law to maintain certain minimum standards for the enforcement of federal requirements that are administered by states. No matter where they reside, American citizens must be able to rely on equal protection under federal law. Let me emphasize that we intend to carry out our statutory responsibility to maintain those minimum enforcement standards, and that includes evaluating whether state audit immunity or privilege laws deprive the state of adequate authority to enforce the requirements of federal programs. The requirement that states maintain such authority is spelled out in our environmental laws and regulations, which require states to have civil and criminal penalty authority, as well as the ability to seek injunctive relief.

When it comes to environmental auditing, our position is very clear: states can offer to waive penalties for environmental auditing, but they should reserve the right to collect penalties in the few circumstances outlined in our self-disclosure policy. As noted above, those exceptions include violations that are repeated, that result in serious harm or imminent and substantial endangerment, that reflect criminal conduct, or that allow a company to gain an economic advantage over law-abiding competitors. We have also asked that privilege laws not inhibit the state's ability to prosecute criminal violations and determine that noncompliance has been corrected.

Without this level playing field, states and companies are put in the unhappy position of having to compete against each other. The same violation could cost $2 million in penalties in one state, but costing nothing in a neighboring state.

The General Accounting Office, in a series of reports ending in 1991, hammered home the need for consistency in the penalties sought by EPA and state agencies for violations of federal requirements. Here is what the 1991 report said about the importance of recovering economic benefit:

As for state penalty practices, we believe that EPA has not only the authority but also sound reasons for requiring states to have a penalty policy that requires recovery of economic benefit. With states responsible for the large majority of enforce-

ment actions, any policies that are set for federal policies alone will have little effect. As a basis for assessing penalties, economic benefit ensures that regulated facilities are penalized in the same way regardless of which state they are in or whether they are regulated by a state or federal agency.

While it is true that eighteen states have enacted legislation to encourage environmental auditing, these laws differ in important details and do not represent a monolithic endorsement of the type of audit privilege and amnesty provisions reflected in S. 582. Indeed, two of these state laws (South Dakota and New Jersey) establish no privilege at all, while in a third the privilege would not apply to government. Several state immunity provisions explicitly do not apply to federal programs, and others offer no amnesty at all for any type of criminal conduct. The minimum standards required under federal law leave plenty of room for experimentation.

In defining the "level playing field" for enforcement of federal laws, we think it is critically important for us to consult with the states. We worked hard to bring state enforcement officials and environmental commissioners into the very early stages of developing EPA's self-disclosure policy. We were particularly pleased that 19 state attorneys general and environmental commissioners joined in signing a letter endorsing our policy, stating that, "We are particularly appreciative of the close consultation between your agency and the states that occurred throughout the process of developing the policy. Many of our recommendations are clearly reflected in the final policy. The consultative model used in developing the policy provides an example of how EPA and the states work in harmony to encourage both voluntary compliance and effective enforcement."

V. THE CRITICAL IMPORTANCE OF COMMON GROUND

We think that the policy that EPA has adopted reflects the substantial common ground among state regulators, district attorneys, the regulated industry, federal enforcement officials, and environmental groups. The policy was developed through a painstaking public process that included a number of public meetings, and a series of intensive dialogue sessions sponsored by the American Bar Association and including major stakeholders in the debate.

I have already mentioned the words of praise from the Chemical Manufacturers Association and states. The Environmental Defense Fund has said that, "the final policy provides responsible companies a break in penalties without letting scofflaws off the hook." And the policy has been enthusiastically endorsed by the National District Attorneys Association, and the New York and California District Attorneys Associations.

In contrast, environmental audit privileges, as well as blanket immunities, have been rejected not only by EPA, the Department of Justice and United States attorneys, but also by many state and local attorneys general and prosecutors, as well as every major environmental organization. Let me emphasize that the opposition to privilege laws at both the federal and state levels is bipartisan. Sponsors of this legislation which purports to encourage compliance should ask why it is so firmly opposed by federal, state and local officials charged with enforcing the law.

VI. CONCLUSION

Ultimately, both industry and government will be judged by the public. We think EPA's policy best reflects the public expectation that compliance should be encouraged through a mix of incentives and sanctions that reflect an enforcement policy that is both fair and firm. And we think industry will benefit the most not by arguing for forms of secrecy, but by placing its compliance programs in the full light of day.

Thank you for the opportunity to testify, and I'll be pleased to answer any questions.

Senator GRASSLEY. For the benefit of the other members, I didn't introduce Ms. Schiffer. She is not going to testify, but she is available to answer questions and she is from the Department of Justice.

Am I right on that, or did you want to make a statement?

Ms. SCHIFFER. No. Because of the time constraints, Ms. Coleman is going to speak for the Justice Department.

Senator GRASSLEY. Ms. Coleman.

STATEMENT OF VERONICA COLEMAN

Ms. COLEMAN. Mr. Chairman, members of the subcommittee, I am pleased to be here today to state my opposition to S. 582. As a public servant and law enforcement officer, I oppose legislation that in its simplest terms lets the guilty go free. I am especially dismayed because it is the public health and safety that will be the prime victims of these grants of privilege and immunity.

As I looked at this bill, I have asked myself what is the problem that is being addressed? Industry is already doing audits and self-compliance. What is broken? Who or what are we trying to protect? As a prosecutor, when someone talks about non-disclosure and keeping information from the public, my prosecutorial antennae go up. I want to know what they have got to hide, and this legislation raises my antennae.

I am told that this bill is founded upon the notion that the Department initiates a large number of enforcement actions which are based upon environmental audits. This is simply untrue. We do not seek audits to initiate enforcement actions and the Department is aware of any case of abuse of environmental audit reports, and it is unreasonable to assume that we would treat honest corporate citizens unfairly. Our canons of ethics and principles of Federal prosecution insist that we dispense justice fairly and without prejudice or favor.

What S. 582 does is promote a culture of secrecy by creating privileges that may hide the scope and depth of an environmental disaster. Privileges are disfavored in the law. A privilege under the law is defined in part as a particular benefit or advantage enjoyed by a person, company or class beyond the common advantages of other citizens. It is an exceptional or extraordinary power or exemption. This privilege allows the privileged party to exclude evidence or information from public view regardless of its relevancy to issues, like who has been hurt, how widespread is the disaster from the violation, and who knew about it, when.

This proposed legislation will handcuff law enforcement. Because the violator hides behind the audit, the definition of which is all-encompassing, then claims a mistake was made, law enforcement may never uncover the truth about what the violator knew about the violation or when he knew it, even though Federal criminal laws may have been seriously violated.

The ultimate slap to law enforcement occurs when you grant the wrongdoer immunity from civil or criminal enforcement simply because he brought the violation to the attention of some State or Federal official. No one asks the questions, does the violation create an immediate threat or danger to persons or property, who has been hurt by the conduct of the violator. Some of these hazards kill or injure people. How widespread is the damage? What natural resources have been damaged and who should pay for the resulting damages? Are the remedies taken by the company sufficient?

This legislation does not even allow the Government to issue cease and desist orders for violations that may clearly be dangerous. This bill takes the enforcement out of law enforcement and will harm our ability to protect the public from even the most egregious violations.

Our environmental laws make those most knowledgeable about their activities accountable for their actions. The public is in no position to know of the harms being perpetrated by regulated industries, and the public depends on strong enforcement to deter or prevent violations of the law. Much like our speeding laws, enforcement encourages people to obey the speed limit. This legislation, which allows violators to go scott free, turns its back on law enforcement and will severely harm the deterrent value of our environmental laws. No other area of law contains these special privileges and immunities from enforcement in order to encourage compliance.

We can easily imagine what the public reaction would be in the event of a release of a deadly cyanide compound from a chemical plant. The operators must report such spills, true. Whether required or not, we can expect that they should also and will conduct periodic self-compliance reviews. If such reviews are not available, how will we ever know whether the spill resulted from an accident or criminal acts? How can we assure the public that such incidents will not happen again? This legislation will not only keep the public from discovering the contents of their audit reviews, but the scope and review of damages would be delayed as regulators and law enforcement engage in wasteful litigation trying to obtain this information. Worse, while the parties are litigating the issues, the dangers continue, and as the final result of this statute responsible persons will walk away without punishment because of a legislative grant of immunity previously unknown in law enforcement.

The effect of this legislation on law enforcement can be analogized to another well-regulated area of the law. A bank president walks into my office and he tells me he is systematically stealing from a bank. There has been an audit and he has come to me promptly to disclose that he has been stealing. He also tells me, by the way, I am initiating a policy today to make certain that I don't steal again. He says, by the way, under this audit bill I have immunity and I don't intend to give you the money back. Here, you have an unpunished crime and unjust enrichment of proceeds obtained illegally. That is what this bill will do for environmental violations.

Thank you.

[The prepared statement of Ms. Schiffer and Ms. Coleman follows:]

PREPARED STATEMENT OF LOIS SCHIFFER AND VERONICA COLEMAN

SUMMARY

The Department of Justice opposes S. 582 in particular and environmental audit privilege legislation in general. This legislation would give environmental violators,. including criminals, sweeping immunity from accountability and create a cloak of secrecy that is against the public interest. S. 582 is detrimental to law enforcement and to the environment.

The immunity provisions could allow violators, including those engaged in criminal conduct, to go free regardless of endangerment to the public or serious environmental harm. This would frustrate legitimate enforcement efforts and discourage companies from taking precautions to avoid violations in the first instance. That a company could escape prosecution merely by confessing and initiating corrective action is unparalleled in any enforcement scheme. S. 582 could be interpreted to immunize conduct underlying even legally required disclosures, such as for oil spills

and releases of hazardous substances. Consequently, companies electing to comply with the law will be economically disadvantaged.

The privilege provisions would be a radical departure from current law and would disrupt the ability of law enforcement to protect the public. The broad definition of "environmental audit reports" would give rise to privilege claims for a variety of routine communications, tying up enforcement actions in burdensome litigation and slowing and even halting criminal investigations. To further complicate enforcement, those who would lie about other aspects of their business could be expected to falsely label numerous documents as "environmental audit reports." In sum. S. 582 would permit important public health information to be concealed and the truth-seeking process to be impaired.

This type of legislation is unnecessary. It is largely based upon a misconception that the Department bases many enforcement actions on environmental audits. This is wrong. The Department does not seek audits to initiate enforcement actions and rarely uses audits as evidence. The Department is unaware of any case of abuse of environmental audit reports by either federal or state prosecutors. In fact, the Department and the EPA already encourage self-auditing through policies issued in 1991 and 1995. Industry data shows that more companies are performing audits all the time and that a principal reason for this trend is strong enforcement.

For these reasons, the Department joins the National District Attorneys Association, the California District Attorneys Association, the New York District Attorneys Association, Attorneys General from at least seventeen states, many state and local agencies and environmental officials, and newspapers across the country in opposing this kind of legislation.

I. Introduction

Mr. Chairman and members of the Subcommittee: I am Veronica Coleman, United States Attorney for the Western District of Tennessee. With me here today is Lois Schiffer, Assistant Attorney General for the Environment & Natural Resources Division of the Justice Department. We are pleased to have this opportunity to present the views of the Attorney General on several issues crucial to law enforcement and to the ability of the public to protect itself from environmental threats: (1) whether Congress should immunize self-disclosed environmental violations from criminal or civil enforcement; (2) whether Congress should create a privilege that would conceal environmental violations from law enforcement officials and from the public; and (3) whether Congress should create such legislation when there is neither demonstrated need for it nor empirical evidence that it would improve environmental compliance. Our testimony today will explain why the Justice Department opposes legislation, such as S. 582, that would establish a privilege for environment audit reports and would grant immunity to environmental violators for self-disclosed violations.

We all believe in law enforcement as a way of obtaining compliance with the law. This bill would create obstacles to enforcement that could be utilized by those who elect to violate the law. This bill turns its back on law enforcement as a means of obtaining compliance with the law, and that is simply wrong.

No other area of regulation seeks a special evidentiary privilege and immunity from enforcement in order to encourage compliance with the law. The Department cannot support proposed legislation that would unjustifiably limit the public's right to know about matters that affect public health and safety, the environment and the future of our children. In defense of both the environment and those law-abiding businesses working hard to comply, the Department will oppose a bill that makes secrets out of violations and gives immunity to lawbreakers.

The Environment & Natural Resources Division of U.S. Attorneys' Offices work together with our client agencies to bring several hundred civil enforcement actions each year in which we seek to correct the violations, prevent harm to the environment, recover any economic benefit of noncompliance, and deter future violation. We bring a smaller, but significant, number of criminal cases each year in which the conduct of the violator is so egregious as to warrant criminal prosecution. For those violators who do not voluntarily comply, a vigorous enforcement program is necessary to remedy violations, punish criminal conduct, and deter violations. A strong enforcement program also serves to protect those companies who comply voluntarily from being competitively disadvantaged by those who do not.

A misconception of proponents of this type of legislation is that the Department bases a large number of enforcement actions on environmental audits. In fact, as I will discuss in more detail later, audits are not sought to initiate enforcement actions and are rarely used as evidence in such actions. They can, however, be very important evidence in those cases in which they are used.

A critical part of environmental protection is voluntary compliance. The Department fully supports the use of self-auditing as a means to ensure compliance with

environmental laws. The business community also supports self-auditing, which is already utilized by the vast majority of medium and large companies. The Department agrees that self-auditing, self-policing and voluntary disclosure of environmental violations can play a crucial role in promoting environmentally sound business practices. That is why, since July, 1991, it has been the express policy of the Department that these activities are important mitigating factors in the exercise of criminal prosecutorial discretion. Under the Department's policy, positive steps by regulated entities to disclose their violations and to bring themselves into compliance with environmental laws are considered at the point when the decision is made whether to bring a prosecution, and, if so, what charges to bring.[1]

In addition to continuing to follow its 1991 policy, the Department generally will not seek information concerning environmental auditing from a regulated entity prior to receipt of other information suggesting that the entity has committed violations of environmental law. We will also view the use of effective programs to prevent and detect violations of law, as well as self-reporting, cooperation and acceptance of responsibility, as mitigating factors in the sentencing phase of environmental criminal cases against corporations.

In December of last year, EPA announced a new "Incentives for Self-Policing Policy," which expands incentives for regulated entities that voluntarily discover, promptly disclose, and expeditiously correct environmental violations. While Mr. Herman will discuss the specifics of that policy, let me just say that the approach taken in EPA's policy succeeds in balancing strong enforcement for wrongdoers and leniency for good actors in order to ensure continued protection of the American public and of our Nation's environment. EPA's Incentives for Self-Policing Policy, in conjunction with the Department's policies and our shared commitment to an aggressive enforcement program, will encourage environmental compliance auditing, voluntary disclosure, and greater compliance with the environmental laws.

The Department strongly opposes S. 582, which is hopelessly flawed. Our principal objection to the bill is that it would impair enforcement. It would shield illegal, including criminal, misconduct; interfere with law enforcement; conceal information vital to public health and safety; result in costly litigation and squander limited enforcement and judicial resources; create an atmosphere of distrust between regulators and regulated entities; and conflict with public policies of openness and corporate accountability. In sum, this bill rewards those who flout the law and punishes those who obey it. Therefore, we strongly oppose its enactment.

II. Immunity for self-disclosed violations would directly interfere with fair and effective enforcement of the law

The Department opposes enactment of both the environmental audit privilege and the immunity provisions of S. 582. The immunity provisions would allow violators, including those engaged in criminal violations of environmental statutes, to go free. The notion that a company can escape prosecution even for criminal conduct merely by confessing and belatedly taking action to correct its wrongdoing is unparalleled in any other enforcement scheme of which the Department is aware. It would be unconscionable to create a statutory immunity for violations of federal statutes designed to protect the health and safety of the American public irrespective of whether those violations may have endangered the public, damaged the environment, or resulted in long-term environmental harm. As Massachusetts Attorney General Scott Harshbarger has aptly noted, "The immunity provision is akin to Congress passing a law allowing anyone who confesses a crime to escape prosecution, so long as they apologize and promise to make amends."[2]

Providing immunity for violations voluntarily disclosed to the government would frustrate legitimate enforcement efforts and discourage regulated entities from taking sufficient precautions to avoid violations in the first instance. Currently, the law sends a powerful message that those who are in a position to prevent or to remedy a violation must do so.

An immunity provision sends a different message: there is no need to take a proactive approach to environmental management because a company can immunize itself from civil and criminal penalties even after it has caused serious environmental problems, by conducting an audit, disclosing, and only then initiating action to correct those problems. The illegal conduct of environmental polluters costs soci-

[1] U.S. Department of Justice, "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

[2] News Release, Office of the Attorney General, The Commonwealth of Massachusetts (Mar. 27, 1995) with reference to the immunity provision in H.R. 1047, the analogue to S. 582 in the U.S. House of Representatives.

ety billions of dollars, causes damage to our nation's natural resources and has caused serious injury and death. It is no less deserving of criminal punishment than other types of criminal conduct.

For example, last year, the Department of Justice prosecuted a Florida company and two individuals for illegal disposal of toluene, a toxic solvent, in the company dumpster.[3] Two 9-year old boys, from the adjacent residential area, who were playing in the area, climbed inside, were overcome by the fumes, and died. On June 12, 1995, not far from this hearing room, the U.S. Attorney for the District of Columbia announced the guilty pleas of two individual employees responsible for illegally disposing of the same deadly solvent in a dumpster, this time near the Bruce Place housing project in Southeast Washington.[4] These are not speculative dangers. Yet, if the Florida company or the individuals had learned of the boys' death before the government, and had confessed and promised to clean up the dumpster, they may have been eligible for amnesty from criminal prosecution pursuant to S. 582. This potential outcome is completely unacceptable.

Although it is not entirely clear, this bill could be interpreted to give immunity even for legally required disclosures, thus immunizing from penalties those responsible for oil spills, releases of hazardous substances, and other environmental hazards where reporting of the violation is mandated by law. Such immunity can only result in severe damage to the health and safety of the public and to the environment.

It does not even appear to be a prerequisite to obtaining immunity that the violator remedy any environmental harm resulting from the underlying violation. Thus, if through negligence, recklessness, or perhaps even intentional conduct, a company were to allow an oil pipeline to leak for years and contaminate the drinking water, the company need only inform the authorities and agree to repair the pipe to escape all sanction. Because initiating steps toward future compliance appears to be all that is required, it would not even be required to clean up the groundwater. Immunizing such conduct will discourage companies from maintaining a high standard of care.

By favoring violators, the penalty immunity provisions of S. 582 effectively punish law abiding companies. A company that makes the expenditures necessary to treat its wastewater should not be a competitive disadvantage to one that ignores the law for years and decides to confess and obey the law only when the resulting water pollution is unmistakable.

Consider a situation where the manager of a facility for a large corporation decides to forgo improvements necessary to meet environmental requirements, so as to save expenses and increase profits. Suppose the company saves a million dollars, and in so doing gains an advantage over its competitors, and increases its market share. Sometime later the company's management does an audit, discovers the violations that were a foreseeable consequence of its lack of expenditures, corrects the violations and discloses it to the government. If this bill were enacted, the company would not have to pay any penalty, would retain the million dollar economic benefit from its violation, and would keep the competitive advantage it gained from its violations. It is precisely because of this type of scenario that many responsible corporations support the disgorgement of illegally obtained profits from violators.

Another disturbing aspect of the bill is its prohibition on the issuance of cease and desist orders by a federal agency for violations that were voluntarily disclosed. Irrespective of the circumstances under which a regulatory agency learns of a violation, it must retain the authority to order immediate action to prevent further harm. The bill would directly interfere with EPA's ability to protect the public from environmental catastrophes, such as drinking water contamination or oil spills.

III. An environmental audit privilege would interfere with the truth-seeking process, impair law enforcement, result in abuse, and conceal information vital to public health and safety

The provisions of S. 582 that create a new privilege are as flawed as those providing for immunity. S. 582 would create a discovery and evidentiary privilege for environmental audit reports and a testimonial privilege for persons who conduct environmental audits. Evidence that is derived from privileged documents could be determined to be inadmissible as well as "fruit of the poisonous tree."

As explained below, an evidentiary privilege for environmental audits would be a radical and unjustifiable departure from current law. An audit privilege would have no certain benefits, but would disrupt law enforcement and the ability of the public to protect itself from environmental harms. Legislative creation of such a

---

[3] *United States* v. *William Recht Co.*, (M.D. Fla).

[4] *United States* v. *Mary Ellen Bauman and Patrick "Pookie" Hill*, (D.D.C.).

privilege is not only unnecessary, but unwise, and we strongly oppose any such provision.

An environmental audit privilege would interfere with the truth-seeking process

Evidentiary privileges are quite limited in our legal system, and with good reason. Privileges interfere with the truth-seeking process by limiting access to relevant and often very persuasive evidence, contravening "the fundamental principle that the public * * * has a right to every man's evidence."[5]

S. 582 would create a special evidentiary privilege for corporations, something that the Supreme court consistently has been unwilling to do. Unlike individuals, corporations enjoy no general privilege under the Fifth Amendment against self-incrimination. Thus, ordinarily corporations cannot, and should not be able to, withhold incriminating information that is responsive to government subpoenas.[6]

Environmental law is not the only legal arena involving complex regulations. For example, tax, securities and governmental contracts involve equally complex regulations, and often self-reporting as well, but there is no evidentiary privilege for audits or internal reviews performed in connection with these subjects. Indeed, since environmental statutes are designed to protect the public health and safety, there are especially strong reasons to avoid creating a mechanism for shielding information about potential environmental violations.[7]

An environmental audit privilege would impair enforcement

The environmental audit privilege that would be created by this bill would embroil enforcement in expensive and time consuming litigation. It would be far broader and more destructive than the few, limited existing privileges in federal law.

For example, S. 582 appears to confer a privilege upon all aspects of an environmental audit report, including facts and data, as well as conclusions and opinions, unlike existing privileges, which protect communications, not the underlying facts.

Because the privilege is not restricted in its application to detailed, comprehensive audit reports prepared by outside consultants, it appears that many communications could be claimed as "audit reports." For example, the legislation might prohibit the use at trial of internal memoranda prepared by managers to their supervisors addressing known, ongoing environmental problems. Indeed, the legislation might even prohibit the use of ordinary oral statements made by one employee to another concerning environmental problems.

The impediments that S. 582 would create for criminal investigation are profound. It would interfere with routine law enforcement activities. As just one example, many criminal investigations begin with a tip from a company insider who, disturbed by illegal activities he has observed, notifies authorities, often providing written corroboration of the violations. If S. 582 were law, an investigator may be unable effectively to pursue that tip because the investigator would not know whether the corroboration provided by the whistleblower came from an environmental audit report. Even the whistleblower might not know whether the document could be classified as a part of an environmental audit report, given the broad definition of that term in S. 582. If the investigator were to proceed with the investigation and it were later determined that the corroborative document was privileged, then all subsequently obtained evidence could be suppressed as fruit of the privileged document, even if it demonstrated criminal conduct and even if there were no wrongdoing by the government. Therefore, instead of pursuing leads to determine whether wrongdoing had occurred, the investigator could be forced into an *in camera* proceeding, forcing notification of the investigation to the company and thereby cutting off the investigative phase of the case prematurely.

It would also interfere with the government's ability to execute search warrants after having demonstrated probable cause to believe that criminal conduct had occurred. Whereas now the agents executing a criminal search warrant are able to segregate those documents that appear to involve an attorney and thus might be subject to the attorney-client privilege, they would have no way of determining which records to segregate as potentially falling within the environmental audit privilege. Documents relating in any way to environmental compliance could be

---

[5] *University of Pa.* v. *EEOC,* 493 U.S. 182, 189 (1990 (quoting *United States* v. *Bryan,* 339 U.S. 323, 331 (1950) and *Trammel* v. *United States,* 445 U.S. 40, 50–51 (1980)).

[6] *See, e.g., Braswell* v. *United States,* 487 U.S. 99 (1988); *Bellis* v. *United States,* 417 U.S. 85 (1974); *In re Grand Jury Proceedings,* 861 F. Supp. 386, 389–90 (D. Md. 1994).

[7] Proponents of an environmental audit privilege cite the so-called "self evaluative" or "self-critical analysis" privilege as support for their position. But the self-evaluative privilege has never been applied where the information in question is sought by a government agency for law enforcement purposes. See, e.g., *FTC* v. *TRW, Inc.* 628 F.2d 207, 210 (D.C. Cir. 1980).

deemed privileged and those investigators who read them could be "tainted" and thus disqualified from further participation on the case.

There are two situations in which operation of the privilege would be particularly unfair—(1) where the audit whitewashes the environmental record of a company with a long history of noncompliance and (2) where a company that is fully aware of its environmental responsibilities as a result of an audit chooses to ignore them to save money.

In the first scenario, the company could have been engaged in years of dumping its toxic wastes on its property, contaminating both surface water and groundwater. The company decides that it should begin disposing of its wastes lawfully and only when arranges for a compliance audit of its facility and begins to send its wastes to a landfill authorized to dispose of the waste legally. It does nothing to address the environmental contamination that its past illegal activity has caused. Under S. 582, the company could claim a privilege for any observations by the auditor as well as all samples of the waste taken during the audit.

A second situation is presented by a company that, for a number of years, handles its toxic wastes lawfully, consistent with an internal company audit. Then the company runs into financial difficulties, and, looking for a way to save money, hires an unlicensed waste hauler to dispose of the drums of hazardous waste illegally. The pre-existing audit clearly demonstrates that the company knew the type of wastes it was generating, its hazardous characteristics, and the lawful method of disposal. However, the privilege in S. 582 would bar the use of this critically important evidence of knowledge regardless of the harm caused by the company's unlawful conduct.

The exceptions to the privilege in S. 582 would not address either of these scenarios. It is not even clear that the government could obtain access to documents that are claimed to be privileged for the purpose of proving that one of the exceptions applies. Thus, the government may be required to participate in the *in camera* hearing without ever having reviewed the documents under consideration by the court. In sum, the privilege directly hinders environmental enforcement to the detriment of public health and safety.

A new evidentiary privilege could result in abuse

An audit privilege would be susceptible to abuse by unscrupulous entities. While most regulated entities voluntarily comply with environmental laws, there are some who would take advantage of an evidentiary privilege to shield all kinds of evidence of wrongdoing from authorities. Many of the defendants in environmental criminal enforcement actions have defrauded or lied to the government as well as violated environmental laws. People who would lie about other aspects of their business or environmental practices could be expected to falsely label documents as "environmental audit reports" as well to claim a privilege.

A privilege statute would conceal from government officials and the public information directly affecting public health and welfare

An evidentiary privilege would create a legal right to conceal from the public and from public officials information regarding potential risks to public health and the environment. The public has a right to know of environmental hazards that may pose a threat to their community.

Environmental regulation relies on public and governmental scrutiny of information relating to the handling of environmental contaminants. Citizens and government agencies use such information to make reasoned judgments regarding steps to protect public health and safety and to fashion appropriate responses to violations. Openness and accountability have always been and continue to be foundational in environmental law, and they are values from which we should not retreat.

Federal environmental statutes generally rely upon one or more systems of recordkeeping and reporting of compliance data by those subject to the regulatory scheme. But that system depends upon the accuracy and completeness of the environmental information reported. Government officials must have access to information to aid them in prosecuting knowing falsifications of such data and otherwise ensuring its reliability. Testimony and documents prepared by whistleblowers and outside consultants, such as environmental auditors, are often important to determining the reliability of company records. Such information would often be unavailable pursuant to the evidentiary and testimonial privileges in S. 582.

Environmental statutes are also premised on the notion that the American people have the right to know about and to protect themselves and their families from environmental hazards. There is a specific statute designed to inform the public of potential pollution risks, Title III of CERCLA, the Emergency Planning and Commu-

nity Right-to-Know Act (EPCRA). 42 U.S.C. 11001–11050. Our experience with statutes such as EPCRA suggests that companies voluntarily reduce the amount of pollution they generate when their actions are subject to public scrutiny.[8]

Imagine the public outcry if the government were prevented from obtaining audit information about a violation leading to death or serious bodily injury. Indeed, in the wake of the Exxon *Valdez* disaster, Congress amended the immunity provision contained in the oil reporting requirements of the Clean Water Act to ensure that the government would not be prevented from utilizing an oil spill notification against a corporation or responsible parties other than the natural person actually providing the notice. Corporate secrecy does not serve any environmental goal; it just protects polluters.

IV. There is no valid justification for passage of S. 582

Corporations, and the lawyers who represent them, claim that a new federal evidentiary privilege, and the provision of immunity to violators, are needed to encourage the use of audits. However, their argument fails to take into account the facts, the law, the public policy as reflected in the laws enacted by Congress, or the adverse impact on the environment and law enforcement that would flow from the enactment of privilege and immunity legislation.

There is no evidence of any abuse of audit information by civil or criminal prosecutors

Proponents of an environmental audit privilege have tried, but failed, to show a need for an evidentiary privilege based on prosecutorial abuse. The Department of Justice has not been able to find any cases involving abuse of audit information by prosecutors. In the more than 700 environmental criminal cases prosecuted by the federal government since 1982, only a handful involved the use of an actual environmental audit report for any purpose.[9] In most of those cases, the audit was obtained after an investigation was well underway based on other evidence, and they were used to provide direct evidence that someone knew of ongoing violations (and sometimes also of the environmental harm likely to result from those violations) and chose not to correct them. The cases do not reflect abusive enforcement practices by the government, but instead reflect the proper use of evidence of criminal conduct by company officials. A privilege would provide a legal basis for hiding evidence of crime.

Some proponents of privilege concede that the problem is one of perception, no reality. The answer to that misperception is to create positive new enforcement policies and publicly to correct misperceptions, as EPA has done, not to pass legislation that will hide information from law enforcement and the public.

An example will demonstrate how the Department exercises its criminal prosecutorial discretion in cases involving self-disclosed violations. In a recent case involving Potomac Electric Power Company (PEPCO) where the company voluntarily disclosed a long history of knowing environmental violations and cooperated fully in the investigation of those responsible, no criminal prosecution was brought against the company. Under DOJ's present policy, PEPCO was encouraged to come forward and cooperate fully, and the individual responsible for the criminal conduct was successfully prosecuted.

Environmental auditing is encouraged, not deterred, by strong enforcement

Proponents of a privilege also argue that the threat of enforcement has chilled environmental audit efforts by the regulated community. To the contrary, available data shows that more companies are performing audits all the time, and that companies that conduct audits are continuing to expand and improve those programs.[10] The most recent survey of trends in corporate environmental auditing, Price Waterhouse's Voluntary Environmental Audit Survey of U.S. Business (March 1995), found that 75% of the companies surveyed have existing auditing programs,

---

[8] For example, from the passage of EPCRA in 1988 until 1993, the most recent year for which statistics are available, reported toxic releases declined nearly 43%. EPA, Environmental News, p. 1 (Mar. 27, 1995).

[9] These involved the use of documents that generally would meet EPA's definition of "environmental auditing," which is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 60 Fed. Reg. 16875, 16876 (April 3, 1995). In contrast, daily factory inspections and other such routine business practices appear to be potentially privileged "environmental audits" pursuant to S. 582.

[10] *See*, Note, *Environmental Criminal Enforcement and Corporate Environmental Auditing: Time for a Compromise?*, 31 Am. Crim. L. Rev. 123 (1993), citing a 1992 Arthur D. Little, Inc. survey of Fortune 100 companies in which eighty percent of respondents stated that they planned to expand their corporate environmental auditing programs.

and that ⅓ of these companies without existing auditing programs plan to develop one.

One of the principal reasons for the increase in auditing in recent years appears to be the strength of DOJ's and EPA's current environmental enforcement program.[11] Companies perform audits and correct violations found in those audits because they know that if they do not, they will be subject to criminal sanctions, civil penalties, the cost of remediating environmental harm, tort liability, and litigation costs. Last year's Price Waterhouse survey of environmental auditing practices of U.S. companies verified that strong enforcement has the effect of increasing compliance levels and inspiring more companies to undertake audits in order to discover and correct violations. Specifically, 96% of respondents indicated that one of the reasons why they perform environmental audits is to identify and correct problems before they are discovered by an agency inspection.

Thus, a disincentive to audit simply does not exist, but passage of S. 582 is almost certain to impede the current enforcement program, thus eliminating a current incentive to audit.

A privilege is unlikely to generate more environmental audits or improve environmental compliance

Despite the claims of its proponents, there is little or no reason to believe that an environmental audit privilege would increase the amount or the quality of environmental auditing. Among those companies responding to the Price Waterhouse survey, the most important reason given by those companies that do not currently audit for their failure to do so was a belief that their products and processes have insignificant environmental impacts. A concern that audit information could be used against them for any purpose was identified by slightly fewer than one in five respondents. For those companies unwilling to expand an existing auditing program, limited company resources was the principal reason identified, not fear of enforcement. While 49% of respondents expressed an interest in obtaining a federal audit privilege, almost the same number (45%) expressed an interest in having EPA adopt a presumption against company criminal prosecution if a comprehensive audit program is in place, corrections are made, and violations are reported. EPA's self-policing policy contains precisely such a presumption. Thus, a federal environmental audit privilege would not be likely to be any more effective in encouraging audits than the policy that EPA has already adopted.

Proponents of an audit privilege also argue that better auditing will result from the creation of an evidentiary privilege for audits. There is no empirical support for this assertion, but in any case, better auditing is not the principal goal. Better environmental protection is the goal. Detailed, thorough audit reports that sit on the shelf benefit no one. The existence of an audit privilege will diminish the current incentive to promptly correct violations as well as to identify them before enforcement authorities do so. With the privilege as an obstacle to enforcement, companies may believe they will be able to conceal from both the regulators and the public the fact of violations and the environmental harm resulting from the violations.

In addition, public and governmental scrutiny of corporate behavior generally increases the level of responsible behavior, not the reverse. Companies whose environmental record will be scrutinized by enforcement authorities and the public are far more likely to improve their environmental compliance than those whose actions are covered by a shroud of secrecy.

V. State and local opposition to audit privilege/immunity bills

Similar privilege and immunity bills have been introduced in many state legislatures. Because audit privilege and immunity bills would block legitimate law enforcement and would interfere with the public's access to information about threats to their health and safety, numerous state and local officials across the country have strongly opposed these bills.[12] The National District Attorneys Association, from whom you will hear this afternoon, the California District Attorneys Association, the New York District Attorneys Association, Attorneys General from at least seventeen states, and many state and local agencies and environmental officials have opposed these bills. For example, the California Attorney General's office has opposed an environmental audit privilege because it would "hide the truth [from the] people of

[11] The Arthur D. Little, Inc. study referenced in footnote 10 also found that among the primary reasons for the expansion of audits is the existence of significant penalties for non-compliance.

[12] As of our most recent information, the following states had considered but had not enacted environmental audit privilege and/or penalty immunity bills this legislative session: Alaska, Arizona, Florida, Georgia, Iowa, Maryland, Missouri, Nebraska, Tennessee, Vermont, Washington, West Virginia.

[the] state."[13] The New Jersey's Assistant Attorney General for Environmental Enforcement is concerned that a privilege law would "stymie investigations into environmental wrongdoing."[14] On the local level, one county prosecutor explained that such legislation would "create a shroud of secrecy for the bad actors—an iron curtain that will be virtually impossible to penetrate."[15]

In addition to law enforcement and other governmental entities, scores of citizen's groups across the country have banded together to oppose these bills, including public health groups, religious groups, environmental groups, and unions. Moreover, some environmentally responsible companies, such as Westvaco and Intel, have indicated that they find such legislation unnecessary.[16] Finally, many newspapers, including the Great Falls Tribune (Montana), The Tampa Tribune, The Herald (South Carolina), The Virginia Pilot and Ledger-Star, The Denver Post, the Mesa Tribune (Arizona), The Tennessean, The News & Observer (North Carolina), The St. Louis Dispatch, and The Atlanta Constitution have strongly opposed these bills as "dangerously offtarget," "the wrong thing," "a 'get out of jail free' card," "a shield for noncompliance," "a special privilege of secrecy," and "a noxious chunk of mischief." We have prepared a list of statements by state and local officials and by newspapers around the country in opposition to this type of legislation that we would like to submit for the record.

VI. Conclusion

The Department vigorously opposes any bill that would create a privilege for audit-related materials or an enforcement immunity for those who disclose environmental violations to the government. The damage to environmental protection from passage of such a bill, and the real risk to enforcement of the nation's laws, far outweigh any speculative gains these proposals might accomplish. DOJ's and EPA's current audit policies should be allowed to work. They address the concerns made by proponents of S. 582 and, therefore, make any legislation in this area unnecessary.

OPPOSITION TO ENVIRONMENTAL AUDIT PRIVILEGE AND IMMUNITY LEGISLATION (QUOTATIONS)

I. GOVERNMENT OFFICIALS & ASSOCIATIONS

Grant Woods, Arizona Attorney General

"Like last year's failed environmental audit bill, this bill enacts a broad cloak of secrecy in Arizona; more damaging than last year's bill, it would enact a form of criminal immunity." Arizona Republic, 2/7/96.

"If these environmental measures are passed into law this year, the health and safety of every Arizonan will be in jeopardy * * *. It would virtually eliminate our ability to prosecute environmental criminals—not just ours, but the county attorneys, any local authorities, anybody." The Las Vegas Review-Journal, 2/13/96.

Pat Cunningham, Arizona Assistant Attorney General for Environmental Enforcement

"The privilege is wider than any privilege in Arizona law. It will make it much more difficult for us to prosecute violators." Arizona Republic, 2/7/96.

"It has the broadest privilege in Arizona law, broader than attorney-client privilege." The Associated Press Political Service, 2/7/96.

Marlen Dooley, New Jersey Department of Environmental Protection, assistant commissioner

"Although this legislation is intended to encourage companies to act responsibly, it may also be used by unscrupulous entities to shield themselves from liability for past and continuing violations." The Star-Ledger, 3/28/95.

---

[13] Letter from Edwin F. Lowry, Deputy Attorney General, to Carol Browner (May 4, 1995).

[14] Tom Johnson, "Pro-business Environmental Bill Draws Criticism," *The Star Ledger* (Mar. 28, 1995).

[15] *Id.*

[16] Francie Noyes, "Pollution bill not necessary, big firms say," *Tribune Newspapers,* A1, A6 (Mar. 18, 1995) ("Salt River Project, Arizona Public Service Co., and Intel Corp. said they already work with regulators, making special concessions to cooperate unnecessary"); Sammy Fretwell, "Pollution audits entangle Senate," *The State,* B1, B5 (April 17, 1996) ("Eddie Twilley, a spokesman for Westvaco, said the corporation favors disclosure of its audits and doesn't need the protections laid out in the environmental-audit legislation.")

Michael Murphy, Morris County, NJ prosecutor & president of county prosecutors' association

"It will create a shroud of secrecy for the bad actors—an iron curtain that will be virtually impossible to penetrate." The Star-Ledger, 3/28/95.

Ed Neafsey, New Jersey Assistant Attorney General for Environmental Enforcement

"This could seriously undercut law enforcement officials' efforts to prosecute environmental crimes. They could manipulate the privilege (granted under the bill) to stymie investigations into environmental wrongdoing." The Star Ledger, 3/28/95.

James Provenza, Los Angeles County, special assistant district attorney

"This [measure], in effect creates a privilege that could be used by a polluter to shield documents which contain evidence of environmental violations. The bill requires that only documents prepared for the purpose of the audit may be made part of the audit. However, without the ability to subpoena that audit and related documents, a prosecutor would have no way of knowing whether the audit had been inappropriately used to shield access to evidence of criminal or civil liability." San Francisco Daily Journal, 1/29/96.

Rick Romley, county attorney, Maricopa, Arizona

"Not only does the bill run counter to the trend of public disclosure, but Romley says it would create " a safe harbor" in which companies would be insulated from prosecutions. Hiding negative findings of an environmental audit, according to Romley, is not in the public interest." The Arizona Republic, Staff Editorial, 2/19/95.

Linda Spahr, Suffolk County, NY assistant district attorney

"I accept that the audit privilege will encourage audits, but I do not believe that the people pushing them are representative of small and medium-sized businesses * * *. The assumption about what the impact on law enforcement might be is grounded in hypothetical prosecution. There couldn't be a prosecution like those that have been posed, based on just an audit report, done in the past. Every criminal prosecution I've ever seen relates to a discharge into the air, water or land, or to fraud. All our investigations relate to current activities." Pesticide & Toxic Chemical News, 1/25/95.

California District Attorneys Association, Dick Nixon

"The effect of privilege in this area will be to undercut environmental enforcement efforts * * *. This is an intent to freeze enforcement, to dull it." Pesticide & Toxic Chemical News, 1/25/95.

California District Attorneys Association, Edwin Lowry

"[The CDAA] has opposed this type of legislation primarily on the grounds that it will prevent its 58 elected district attorneys and 2,000 member deputies from effectively enforcing California environmental laws * * *. Our concern is this: if the state loses its authority to enforce a law, a defendant who is accused of violating a federal law, like dumping into a river, could claim the state has no authority to press charges." San Francisco Daily Journal, 5/6/96.

The National District Attorneys Association

The NDAA has called environmental self-audits combined with promises of immunity a "flawed enforcement tool." The Evening News, Harrisburg, 2/2/96.

Trial Lawyers for Public Justice, Jim Hecker

"While seemingly benign in intent, this movement threatens to create a new, massive, and ill-defined body of corporate secrecy rights * * *. If the company knowingly violates environmental laws and hides that fact, it is free from prosecution even if a whistleblower reveals the truth. The whistleblower, however, can go to jail * * *. The 'environmental awareness' of chemical companies is not, as proponents of audit privilege insist, proactive. It is a direct response to the consumer's demand for information: members of the public demand to know how they, their children, and their planet are being affected by the actions of their neighbors—Industrial Corporate America." New Jersey Law Journal, 6/5/95.

II. NEWSPAPER EDITORIALS

"Companies and industries shouldn't be above the law just because there's some vague, good-faith setup that is supposed to encourage them to report and audit their own pollution mistakes. That's why we have a DEQ and an AG's office—to monitor, guide, and, when needed, to prosecute. This bill would destroy a valuable balance

affecting companies, regulators and public safety." The Arizona Daily Star, Staff Editorial, 2/18/95.

"You may want to ask [the Arizona state senators who support this legislation] why the threat of criminal prosecution or fears of being held civilly liable for damage to the environment are not sufficient incentives? Or, what makes them so confident that secrecy will breed compliance?" The Arizona Republic, Staff Editorial, 2/19/95.

"As far as can be determined, there is no environmental Gestapo on the loose, shutting down responsible industries and hauling polluters into court. A survey last year conducted by the National Association of Attorneys General of all 50 states found that in only one instance—only one—was information from a voluntary environmental audit used in a civil penalty action. In criminal prosecution, there were only two such cases—hardly an epidemic." The Arizona Republic, Staff Editorial, 2/19/95.

"If an exemption is granted for environmental audits, why not other types of audits as well? The National Association of District Attorneys, writing in strong opposition to federal audit-privilege legislation, points out that 'a privilege afforded this segment of corporate America can only trigger demands for comparable protection by other elements of the business world.'" Atlanta Journal and Constitution, Staff Editorial, 12/22/95.

"Under the bill, if a company's internal files contained proof that it had known for years it was creating an environmental nightmare, but did nothing about it, that information could be kept secret forever * * *. It's odd that such concern should have to be voiced by the attorney general, while the EPD, the agency whose interests are most affected, actively supports a bill that would render it even less effective. That behavior suggests that the problem of enforcing Georgia's environmental laws goes well beyond poorly written laws." The Atlanta Constitution, Staff Editorial, 3/9/95.

"[Voluntary disclosures] shouldn't enable polluters to get off the hook entirely, any more than confessions by tax cheats or other lawbreakers would do so." The Denver Post, Staff Editorial, 8/27/94.

"If you tell on yourself, we won't even slap your hand. And much more in this vein, all of it guaranteed to produce dirtier air and water in Texas." The Fort Worth Star-Telegram, Molly Ivins, Staff Writer, 5/4/95.

"The problem is that self-audit reports—although not accident reports—would be confidential under state law so that companies don't end up getting sued over their voluntary submissions. This is too broad. Legislators need to knock the confidentiality provisions out of this bill." Great Falls Tribune, 3/21/95.

"If the results of internal audits could be kept secret, what would prevent companies from hiding the results and doing nothing to correct the problem? * * *. An unscrupulous company with an eye to the bottom line would be difficult to hold accountable without the threat of public scrutiny * * *. The public has a large stake in clean air and water, and the public should continue to have access to information about who the polluters are." The Herald, Rock Hill, SC, 3/4/95.

"The problem this measure's sponsors claims it would address—unfair treatment of industries that fess up to their own environmental shortcomings—simply does not exist. Companies that turn up pollution violations are not penalized unless they fail to correct the problems in a reasonable length of time." Mesa Tribune, Staff Editorial, 4/9/95.

"Corporate fears that environmental audits will be used in criminal and civil enforcement actions appear overblown * * *. A review of more than 600 environmental cases prosecuted by the Government since 1982 found that only a handful involved the use of environmental audit reports. In those cases, the audit was obtained only after an investigation was well under way based on other evidence. And the audit was used to show that someone knew of continuing violations and did not correct them." New York Times, 10/15/95.

"The "Audit Privilege Bill" keeps the results of environmental audits secret from the public. More aptly titled the "Pollution Secrecy Bill", it would allow industrial plants to hide toxic emissions and discharges from their neighbors. Polluters have always feared bad press more than the meager penalties of regulators. This bill is their dream come true—and a potential nightmare for citizens." The News & Observer, Raleigh, NC, Daniel Coleman, 4/21/95.

"Loopholes could allow the most egregious polluters to get off the hook, even when their misdeeds let them reel in tons of money or their conduct hits criminal dimensions." The News & Observer, Raleigh, NC, Staff Editorial, 5/16/95.

"We do not believe the public or the environment is well served if a citizen living downwind of a dirty smokestack is barred from inquiring about what she's breath-

ing." St. Louis Post-Dispatch, Staff Editorial quoting David Shorr, Director, MO Department of Natural Resources, 3/13/95.

"Under the guise of protecting the environment, [some of the state's most influential industry lobbyists and a few of their friends in the Legislature] would shield those who illegally pollute by making it harder to punish them. They also would make it all but impossible for the public to find out about the polluters in their midst." St. Petersburg Times, Staff Editorial, 4/2/96.

"In other words, a chemical company could determine through "self audit" that it had leaked thousands of gallons of potentially lethal chemicals into the groundwater, and the people who own surrounding wells might have no way to find out * * *. This is what lawmakers commonly call a bailout bill, and it so offends the rule of law that the attorney general's office and the statewide prosecutor have joined public and environmental interest groups in fighting it." St. Petersburg Times, Staff Editorial, 4/4/95.

"[The legislation] does more than give companies cause to be honest. It would allow businesses to keep secret that pollution which threatens the public. It would enable corporations to flout environmental laws without consequence. And it would essentially permit polluters to police themselves, leaving the public at their mercy." The Tampa Tribune, Staff Editorial, 4/4/95.

"The net effect: communities would be prevented from finding out about possible environmental problems in their area." The Tennessean, Staff Editorial, 3/8/95.

"Most people are honest—but not everyone. A company might deliberately dump toxic materials, then 'confess' to an accident * * *. To forgive polluters while denying other lawbreakers parole is to say the environment doesn't matter. It does." The Virginian-Pilot and the Ledger-Star, Staff Editorial, 2/3/95.

III. PUBLIC INTEREST GROUPS

Raena Honan, Arizona Sierra Club

"This is an even bigger hog than last year. Basically, it says you break any old law you want and we don't prosecute because we can't." Arizona Republic, 2/7/96.

"You have to cause actual human harm and widespread environmental damage—that is the threshold." The Associated Press Political Service, 2/7/96.

Dave Dempsey, Michigan Environmental Council

"I think it's going to turn out to be one of the biggest setbacks we've ever had on environmental legislation * * *. [The law] breeds mistrust [and the] feeling that people have something to hide." Crains Detroit Business, 4/1/96.

Thomas Leonard, West Michigan Environmental Action Council

"Here we have a bill that really rewards companies that have not taken a serious interest in doing audits and maybe have not invested as much in environmental compliance and pollution control as other companies, and yet are going to be treated on much the same standard with companies that have really taken a leadership role in this field." Grand Rapids Business Journal, 3/11/96.

Chris Bedford, Environmental Action Foundation

"The real purpose of these laws is to strip away the rights of government, communities and pollution monitoring organizations to uncover environmental and public safety hazards * * *. Corporations do not need secrecy rights to do what they legally are required to do to protect the environment and public safety." The National Law Journal, 2/26/96.

Sandy Bahr, Arizona Audubon Council

"Are we going to allow a special class of people in Arizona to violate our laws without fear of any repercussions, and given them the shield of secrecy for good measure?" The Arizona Republic, Letter to the Editor, 1/23/96.

Senator GRASSLEY. Thank you very much. Before I ask a question, I will make a couple of observations. In your testimony, Mr. Herman, you listed some trade associations, some environmental groups and corporations that support what your administration has done, and I think they are all well-respected and well-recognized and so I don't have any problems with their supporting it, or any negative comments about that, except to—and I am not an introducer of the legislation, so they should speak for themselves, but

it seems to me that in many areas legislation is introduced because there is fear of Washington.

I think the groups that you listed would feel very comfortable with the legislation and with Washington, but with a lot of small companies and small businesses in America—and, you know, it is difficult to prove this, but it shows up at your town meetings and people that don't even have problems with government, but they come there because they actually fear Washington because they know some regulator from OSHA or from EPA, or almost any bureaucracy—IRS, for sure—can come in and really put you out of business.

They know that if they are intimidated, they had better settle because they probably can't afford to fight it, whereas the big corporations and the big interest groups have the—they understand how Washington works, they understand what it takes to fight it, and they have got the resources to fight it.

Whether this is the motive for this legislation or not, I don't know, but a lot of times we try to find solutions that help people that don't really understand Washington and fear Washington and want to really preserve the people that create jobs in the America, and that tends to be the small business more than big business.

So all I ask you to do as you measure motivations for this legislation and who maybe supports what you have already done—and this isn't to bad-mouth what you have done, but just understand that what you have done may not really respond to that fear that is out there about Washington.

Mr. HERMAN. Senator, if I might respond to that because that is a very important point and something that I have learned in the 3 years since President Clinton appointed me to this position—and I have met regularly with small business representatives both in Washington and outside of Washington and from States and they let me know very early on that they were afraid that if they contacted EPA and asked for help or could you come in—they do not do that, they said, because they are afraid of getting penalized.

As a result of those discussions and partially as a result of legislation which you all enacted a few years ago under the Clean Air Act which required States to set up small business compliance assistance centers under the Clean Air Act and which required EPA to promulgate a policy, we promulgated a policy under that which met with very strong support from small business which basically took care of mitigating or eliminating penalties for small businesses that voluntarily came in, asked for assistance, got it, and then complied.

We voluntarily expanded that policy from air to all of the other media and we have had an interim policy. I signed the final policy yesterday or the day before, and basically it incorporates the provisions of the—I don't know which came first; I think we came first—of SBREFA that was passed, the small business reform legislation that was passed this year. Basically, except for exceptions where you have criminal conduct, actual harm, or where somebody has benefited to the detriment of a competitor, we do away with penalties, and we are trying to address that.

With regard to your specific notion, I would suggest that in our experience during our process of putting together the audit policy,

the major proponents of the legislation have been the larger companies who I think we all think are Washington—I don't know if it is good or bad; they are friendly to Washington. They feel comfortable in Washington.

Senator GRASSLEY. Yes, they feel comfortable.

Mr. HERMAN. But we are trying simultaneously, and it is out there already, to address the very question that you have highlighted which I recognized from the very first day I was there was a very serious problem.

Senator GRASSLEY. I assume we are having 5 minutes for questions.

I have a question and it is in regard to what some critics have said, that your final policy benefits will only attach if a number of conditions are fulfilled. Some have expressed the opinion that your agency has the sole discretion to decide whether these conditions have been met and that these are conditions to which reasonable persons would disagree.

What is your opinion regarding that statement that I just gave? How do you expect companies to successfully comply with such conditions if the criteria are apparently so discretionary?

Mr. HERMAN. First, I don't think the criteria are so discretionary. I think as with any other policy or even statute, there are going to be interpretations, although I think our policy in terms of the exceptions and the conditions is pretty clear. What I would point to is that we have had 65 companies come in. We have resolved 15 where in some cases penalties were completely eliminated and in some they were reduced substantially.

You know, the challenge here is building up some amount of trust. It is not one side saying to the other, Just trust me blindly. I think that through our actions, we are actually working to establish that and show that the policy can work, that it is common sense. It was framed with the assistance of people in the business community and the State attorneys general and the environmental community. We made changes after the interim policy had been out for several months, and we think we have come up with something that is workable. I am bragging somewhat, but it is actually working now. Companies are coming in.

Senator GRASSLEY. Senator Kohl.

Senator KOHL. Thank you, Senator Grassley.

Mr. Herman, has any company that has filed under this new policy of yours been criminally prosecuted or fined, any company?

Mr. HERMAN. I am not aware—let me put it this way. I am not aware of any case in which a company has come in and then on the basis of their coming in we have gone after them criminally. With regard to being fined, I know of at least one case where a penalty was not completely eliminated, so there was mitigation, but it was not eliminated.

One of the assertions that we heard when Administrator Browner asked us to undertake this fairly expansive review of our policy was—one of the things we looked at was, you know, have there been cases where the Justice Department or EPA has used an audit to initiate an investigation, and literally there were none, zero. We searched through the files.

I think if we ask ourselves the question, you know, if you have a company that is doing what it says it is doing—it is auditing, it is spotting problems quickly, it is coming in and it is fixing them—I mean, can you imagine—I would defer to my colleague from Tennessee, Ms. Coleman. Can you imagine a prosecutor going after that person? My view is that if you really have a good actor, an audit will provide information that will serve as exculpatory or it will be mitigating. It will not be aggravating.

Senator KOHL. So why don't you then commit yourself to using this policy, no matter what?

Mr. HERMAN. We have. We are using that policy.

Senator KOHL. No matter what?

Mr. HERMAN. What do you mean, no matter—I don't——

Senator KOHL. So that those people who self-audit and come in and admit a problem know beyond any question that they don't face any prosecution.

Ms. SCHIFFER. Senator Kohl, perhaps I could address that question because the Justice Department, as well, has had a policy since 1991 that it will look case by case, but certainly it will be a significant factor in its determination whether to go forward with a prosecution that a company has indeed come in, disclosed, and taken prompt steps to correct.

However, it certainly could be the case that a company could go for years and years polluting in a way that is in clear violation of the Federal laws and, in effect, in a criminal way violating, and one day it wakes up, decides to come in and say that indeed it has undertaken an audit and it now wants to correct. Without knowing the particular facts, if we said that in a blanket way we wouldn't prosecute that, companies would not now necessarily have an incentive to be staying in compliance with the law, protecting public health, stopping polluting.

What we are looking at, after all, here is compliance with our environmental laws to protect public health and the environment. Audits are a tool to get there, but they are not an end in themselves, and if we were to announce now as a matter of statute a blanket policy that we would not prosecute anyone who came forward, which is indeed what S. 582 does, we would, in effect, be announcing an amnesty for people who might be very serious polluters and we think that that is extremely bad public policy.

Mr. HERMAN. Could I, if I might, just add, because we have a policy in place that you have referred to? The exceptions—and I call them protections, actually—I think are quite narrow. In other words, if there was imminent or substantial endangerment or serious harm involved, violation of specific terms of a consent order, individual criminal conduct—in other words, if a corporation comes and says this has been going on and the company has not had a practice of covering up or has not been involved in that practice, the company, we have said, will not be criminally prosecuted. If individuals did it, then they have to bear responsibility, but the company won't for doing the good corporate thing of coming in with bad behavior that they have discovered through an audit.

I don't think anybody would say we should protect criminal behavior or where there has been actual harm or repeat violations. These are the exceptions to the policy, but, in fact, what we are

seeing is that a lot of companies are coming in with problems where in the past they probably would have been fined. We think this is encouraging disclosure and it is not endangering the public.

Senator KOHL. Thank you.

Senator BROWN [presiding]. Thank you. Ms. Schiffer, I was interested in your comment about the amnesty, and you used the term serious polluters, I think. Would you call someone who has violated the law a couple of times in the last few years a serious polluter?

Ms. SCHIFFER. I would need to know a lot more facts, Senator Brown. If, for instance, the way they have violated the law a couple of times was to make major dumps of toxic substances into the groundwater that served as a drinking water supply, the fact that they had done it twice would still be a pretty serious injury, I think, to public health and the environment.

Senator BROWN. So if they had done it twice or something of that kind, they would fit your category of serious polluter?

Ms. SCHIFFER. That kind of a person, to me, would be a serious polluter.

Senator BROWN. Would you help me? Where in the bill do you find a blanket amnesty for those people?

Ms. SCHIFFER. Yes. I would invite your attention to section 3803(c)(2), which I think is on page 7 of the bill as I have it printed. That provides that if somebody comes forward with their information, and that would include coming forward with a report that was required to be filed under our environmental laws, then they can't be prosecuted on the basis of that information.

Senator BROWN. Well, let us take your specific example because you have told the committee under this law that someone who is a serious polluter and had conducted several of those events would have the advantage—I don't see blanket amnesty here. Perhaps my version doesn't have something yours has. I see the word immunity. Is that what you are referring to?

Ms. SCHIFFER. Shall be immune is what the words are. If you prefer that to amnesty, that is fine.

Senator BROWN. No. You had used the words blanket amnesty. I was inquiring if those are in the paragraph which you cited.

Ms. SCHIFFER. Senator Brown, the words of the statute are shall be immune, and what I believe those words could well mean is that if a company dumped toxic substances into the groundwater and then decided it would come forward and tell the prosecutor that, at that point the prosecutor could not use that information to prosecute those people.

Senator BROWN. OK. I am trying to figure out—the words you used, blanket amnesty, apparently do not appear in the statute. Is that correct?

Ms. SCHIFFER. Senator Brown, the words of the statute are shall be immune and, in my view, that would have the effect of being an amnesty.

Senator BROWN. OK, so you think they mean the same thing?

Ms. SCHIFFER. I believe the words of the statute would have the effect of immunizing——

Senator BROWN. You misrepresented what was in the statute. I am trying to get it clear. Now, either blanket amnesty is in the statute, as you implied, or it is not.

Ms. SCHIFFER. Senator Brown, I am trying to take the words that are written here and talk about what their effect would be on our ability to protect the environment and enforce the environmental laws. The words that are written down are shall be immune. To me, they would have the effect of providing amnesty.

Senator BROWN. OK. Now, looking over at paragraph (b) on the prior page, are you familiar with that section?

Ms. SCHIFFER. I have read the statute.

Senator BROWN. Would someone who had violated a serious environmental law several times in the last couple years come under that provision?

Ms. SCHIFFER. Senator Brown, that provision is limited to circumstances where a court has found that a person has violated the law. So that I get the words absolutely accurate, if you would give me a moment to find them, I will.

What the words are in the statute are if such a person or government entity has been found by a Federal or State court to have committed repeated violations, so that if a person had dumped toxic wastes over the drinking water supply, but there hadn't been a court that had found that under this statute, then that person wouldn't meet this exception and they would still be entitled to the immunity that is set forth in the following page.

Senator BROWN. Well, am I right in thinking that people who fit your category of serious polluter would fit under this paragraph?

Ms. SCHIFFER. There are any number of serious polluters who seriously pollute for quite some time, Senator Brown, but it takes us sometimes a while to find them. Therefore, we haven't found them and had them taken to court and therefore found by a Federal or State court to have committed repeated violations. So there are any number of serious polluters who would not fit into the exception in this statute as it is drafted.

Senator BROWN. I thought I asked a pretty straightforward question, and if you don't want to answer it, you don't have to. I am certainly not going to be a stickler for it, but your statement was that serious polluters would receive blanket amnesty. Now, we find blanket amnesty is not in the statute, and we also find this exemption which makes it clear that serious polluters here would not have the benefit of that shall be immune language.

Ms. SCHIFFER. Let me give you a——

Senator BROWN. Now, if I understand what you are saying, there are people who are serious polluters who don't come under this exemption.

Ms. SCHIFFER. Let me give you a specific example, Senator Brown. We had a case in the middle district of Florida where a company and two people who worked for the company put toluene, which is a toxic substance, into dumpsters behind the company, and the next day two children fell into those dumpsters and they died. They died because they were exposed to that hazardous waste.

To my knowledge, that company hadn't before been before a Federal or State court, and so it wouldn't fit into this that a Federal or State court had found repeat violations. But if that company the next day, before the Government had a chance to get to it, came in and said to the Government, we put out these dumpsters, these

kids fell in and they died, then under the provisions of this statute they would have immunity from criminal prosecution. I would certainly regard that company as a serious polluter, as a serious violator of our environmental laws that are designed to protect public health and the environment.

Senator BROWN. The purpose of this hearing is to try and help us draft a law that will be helpful for the environment, and I think that is all our intention. As near as I can tell with that answer, you still didn't answer the question that I asked. Now, you have mischaracterized subparagraph (2). You mischaracterized subparagraph (b).

Let me hasten to add that your example, I think, is one that we wouldn't want to let people off on, that they shouldn't be let off on, but I think we are going to make a lot of progress on this bill if you will help us rather than simply try and paint with all colors. If you will help us on the bill, I think we can make it a better bill.

Mr. Herman, it would be helpful to me if you could spot for us how areas where this proposed statute would differ from the policy that you all have adopted. Parts of it seem similar. Apparently, parts are different. I think it would be helpful to us to understand that difference.

Mr. HERMAN. I think the primary difference, and I think a very important public policy difference, is the provision of a privilege. There is an assumption behind the statute that, one, industry needs a privilege to encourage it to do the auditing or set up compliance management systems which we all want to encourage and which we favor; and, two, that establishing the privilege is worth what I think we have all found to be the negative——

Senator BROWN. I am sorry. My question was a different one.

Mr. HERMAN. I am sorry.

Senator BROWN. That is valuable information, but you have pointed out and Ms. Coleman has pointed out that you already have procedures in place that are meant to help elicit information and help get people to cooperate.

Mr. HERMAN. Right.

Senator BROWN. And there are times in which you do not use that information for prosecution and there are times that you do not necessarily prosecute.

Mr. HERMAN. That is correct.

Senator BROWN. I was hoping that you might walk me through how this statute would differ from what you do now. In other words, where would this provide the information not being used for prosecution where your policy does not now do that?

Mr. HERMAN. Our policy gives us the option of looking at the information and making an informed decision. I think this is the biggest difference. Under the bill, if information remains privileged, we don't know. Second, there is—and I think that what Assistant Attorney General Schiffer has done with her interpretation of the language is, I think, give you a taste of the kinds of arguments that lawyers will make with this, that they should be immune or they shouldn't be immune, or that kind of thing. One of my fears is that that leads to more rather than less litigation.

If I could approach it just another way, and that is to say that, one, we agree with you that we want companies to audit; we think

it is good. Two, companies are auditing. They are doing it. They were doing it before we embarked on this process. Price Waterhouse and others took a survey and there was a tremendous amount of auditing being done, so I am not so sure that this is so much for—to the extent that it encourages others, that there is good, but there are a lot of reasons companies audit. They don't want to get enforced against and it is good business, and for some it is good citizenship. They want to be good. We think that our policy, without some of the, I think, legalistic or legal mine traps, like a privilege, provides a smoother and easier way to accomplish it.

I would just point out there are only a few privileges. We have, you know, priest-penitent, lawyer-client——

Ms. SCHIFFER. Husband-wife.

Mr. HERMAN. Yes, husband and wife, and there is a reason we only have the three. Courts have actually rejected an audit privilege. In all of those areas, you have established institutions, you know, like a bar association, some kind of church board, or whatever, to sort of monitor the integrity of the people in it. We don't have that yet, certainly, with environmental auditors, which is a profession that is just exploding now.

I just think that we are getting into an area where we could create more complications and more litigation doing it this way, and that is my main concern about it. You know, I don't anticipate that we are going to use—and we have said we are not going to use audits to initiate investigations. You know, people say we don't trust you. I mean, this we have a real long record on, track record, which is a good one.

Senator BROWN. Your being that the discretion here allows you to go after egregious cases; that something frozen in statute may not leave you with that enforcement ability?

Mr. HERMAN. Well, I think there is another point, and that is that, you know, as you and Senator Hatfield were discussing earlier, these are all new vehicles that we are using. We have said that in 3 years we are going to do—I have said publicly when I testified before Senator Hatfield in Oregon—you know, he asked me a similar question. You know, how do I know you are going to use this, you know, because ours isn't set in statute? I said I and the Administrator and others, and the Justice Department, we are going to use this policy. This is, you know, this is our policy.

In 3 years, we said, we think it should be reviewed. Should it be fine tuned, should it be chucked out the window, should it be expanded? Should it be put in a regulation, should it be put into statute? I think this is a stage where I think having some flexibility makes some sense. Everybody is complaining about the amount of regulations we have, and statutes, so here we tried to do it a little—my other point is that we were able to get this out pretty promptly, pretty quickly, you know, certainly in interim and then final, and we were able to do it because we didn't go through a formal rulemaking.

What I am very proud of is that we did go through an exhaustive, expansive public participation process which some of the gentlemen that are sitting here now participated in. Kennan Goldman from the ABA is here and he lent us his offices, which was, you know, wonderful and effective, and I think for me it set a model

of how to make public policy. I intend to use it again on some of the other difficult questions.

Senator BROWN. A couple quick questions. I must say from my own way of thinking the immunity in subparagraph (2) that Ms. Schiffer referred to, at least in my mind, raises some real questions and it is one that I think we want to focus on as we go toward markup on this. If that portion of the proposed statute were dropped entirely, but the protections that are somewhat similar to testifying against yourself in the audit reports were retained, would that meet most of your concerns?

Mr. HERMAN. I would have to look at the statute, but I don't think so. I tell you, I feel very, very strongly, and I think the administration feels very strongly about the privilege components of these statutes. I feel very strongly that having privilege——

Senator BROWN. Even though you are not using——

Mr. HERMAN [continuing]. Will undercut——

Senator BROWN. The option of using them still is an important leverage?

Mr. HERMAN. Well, it is not only that. I think that there are several things that drive compliance. One is a company's public image. That is very important in terms of a company wanting to do the right thing and being proud of doing the right thing, and the public has to know. I think if the public thinks that a sweetheart deal is being made—I mean, God knows there is an awful lot of cynicism in the country today with regard to all of us in this room, probably. The last thing we want to do is shroud things in secrecy or have a special privilege dealing with environmental problems. We don't have it with regard to other things and I think it would be a tragic mistake to impose it here.

I think we can go very far, and I think that in our policy we have gone pretty far in encouraging auditing. I mean, we are saying, you come forward, you did a good job, you will be taken care of, you have nothing to fear, and I want to be tested on that and the Agency wants to be tested on that.

Senator BROWN. One last question. Obviously, there is a wide variety of violations that come into question here.

Mr. HERMAN. I am sorry?

Senator BROWN. There is a wide variety of violations which you are charged with responsibility for enforcing and that this new statute would apply to if it is enacted. The immunity section seems to be rather broad, at least in my mind, as it applies. Is there in your mind category or a class of violations that are minor enough that they would merit different treatment than the more serious ones? Is there a logical line to draw in that area?

Mr. HERMAN. I mean, I don't have the particular words in front of me today, but we make those cuts every day of the week——

Senator BROWN. In terms of your discretion as to what you——

Mr. HERMAN [continuing]. In terms of how we exercise our discretion, where we target our resources, the penalties or sentences that our lawyers negotiate and ask for. I mean, we don't have cases, you know, where somebody submits something and it is a little late and we ask for prison, unless it is something very important and it was purposeful. You know, we do think that we exercise our discretion pretty carefully, and that is built in.

Senator BROWN. The folks in Fort Morgan might have a different view of you, but——

Mr. HERMAN. Well, the people we have cited for violations, I would say, almost always have a different view and nobody has ever said to me—I have never gone to a meeting and said——

Senator BROWN. I think they offered you the town, didn't they?

Mr. Herman. Last week I was at the Greenbrier talking before 100 or 200 corporate counsel and not one of them, after I spoke, said, yes, come and get us, you make a lot of sense. [Laughter.]

Ms. SCHIFFER. Senator Brown, if I might add to that, what we are really looking for here is compliance with the environmental laws so that the environment gets cleaned up, and I would expect that that is a common purpose of everybody in this room, frankly. What we see time after time is one of the things that drives that—probably one of the most significant things that drives that is an effective environmental program.

If I were to announce to people right now that if you filed your tax returns on April 20, let us just say, instead of April 15, we wouldn't go after you, we don't regard it as becoming serious until, I don't know, 30 days or something, I think all of us in the room would say, well, there goes April 15 as the date by which people file their tax returns, because the truth of it is having a belief that there will be enforcement is one fails to comply is a very important part of getting compliance. That is why I think that we certainly exercise our discretion fairly, as Steve has said.

We have a series of policies related to small businesses, who are the people who are more in fear of coming forward and complying. But as a general matter, it is very important for people to think, and for us to deliver on that thought, that if they aren't complying with the laws, there is going to be enforcement. This is a law enforcement issue, and therefore carving out some category and saying as to that category we are not going to enforce, we are going to not use the enforcement tools that are available, would be a problem.

Senator BROWN. No, no. That wasn't my suggestion at all. I think you are taking it out of context.

I want to thank the panel. We look forward to working with you as the committee moves forward and we appreciate your input.

Mr. HERMAN. Thank you very much, Mr. Chairman.

Ms. SCHIFFER. Thank you.

Senator BROWN. I will ask the third panel to come forward—Mr. Tom Gehl, who is the director of health and safety with the Kohler Co.; Mr. John Riley, who is the director of the litigation support division of the Texas Natural Resource Conservation Commission. Victor Johnson is the district attorney general for the 20th judicial district of Tennessee, and Ms. Pat Bangert is the assistant solicitor general, Colorado Department of Law.

Senator Kohl, if I may, I would like to ask you to go out of order, if we would. I understand that you have another meeting that you need to get to and votes to cast, and I understand you also have some questions that you would like to address to the panel. Before we go ahead with the opening statements, I would like to ask you to go ahead.

Senator KOHL. No; that is all right.

Senator BROWN. OK. What we will do is go ahead with statements.

Mr. Gehl.

PANEL CONSISTING OF THOMAS P. GEHL, DIRECTOR OF ENVIRONMENTAL ENGINEERING, SAFETY, INDUSTRIAL HYGIENE AND THE CHEMICAL AND METALLURGICAL LABORATORY, KOHLER CO., KOHLER, WI, ON BEHALF OF THE CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL; JOHN ALOYSIUS RILEY, DIRECTOR, LITIGATION SUPPORT DIVISION, TEXAS NATURAL RESOURCE CONSERVATION COMMISSION, AUSTIN, TX; VICTOR S. JOHNSON, DISTRICT ATTORNEY GENERAL, 20TH JUDICIAL DISTRICT OF TENNESSEE, AND VICE PRESIDENT, NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, NASHVILLE, TN; AND PATRICIA S. BANGERT, SENIOR DEPUTY SOLICITOR GENERAL, COLORADO DEPARTMENT OF LAW, DENVER, CO

STATEMENT OF THOMAS P. GEHL

Mr. GEHL. Mr. Chairman and members of the subcommittee, my name is Tom Gehl. I am the director of Environmental Engineering, Safety, Industrial Hygiene and Corporate Laboratory for the Kohler Co. The Kohler Co. is a 122-year-old privately owned company of 16,000 employees headquartered in Kohler, WI.

I have prepared a longer written statement and would respectfully request that that be entered into the record.

I am here today as a member of the board of directors of the Corporate Environmental Enforcement Council, called CEEC, an organization of 20 diverse companies with a strong commitment to the environment and environmental compliance programs. At the same time, I want to acknowledge that there have been many in the business community who have worked diligently to support environmental audit and voluntary disclosure legislation at both the Federal and State level, and one of the groups that has been a leader in this effort is the National Association of Manufacturers, an organization with which I am proud to be associated. I appreciate the opportunity to testify before you today in support of many of the concepts embodied in S. 582, the Voluntary Environmental Audit Protection Act.

Mr. Chairman, CEEC members are supportive of strong environmental enforcement programs directed at those who willfully and intentionally violate our Nation's environmental laws and cause environmental harm. Yet, we are concerned that environmental enforcement often serves its own interests rather than the goals of environmental protection. When this occurs, enforcement itself creates serious obstacles to auditing and innovation, especially for those who want to work with the Government and desire to go beyond compliance.

CEEC has carefully considered issues relating to auditing and voluntary disclosure. Without question, the failure to have in place adequate and certain protections for voluntary audits and voluntary disclosures has created strong disincentives to conduct environmental auditing. The current lack of such protections also has a chilling effect which most often limits the utility and scope of au-

dits that are undertaken. The reality of this situation is not good for the environment.

Mr. Chairman, a business, university, municipality, hospital, or other responsible regulated entities that audit, as well as their management and environmental personnel, should not be in a position of greater potential liability than a regulated entity that does not audit. This, we respectfully request that this committee take steps necessary to ensure that responsible members of the regulated community that conduct environmental self-evaluations do not create or expand their environmental civil or criminal liability or the liability of any individuals.

Mr. Chairman, the concepts behind the legislation are very sound, are good for the environment, and we commend you for your development of the legislation. The regulated community wants to voluntarily audit their facilities, correct non-compliance, and improve their operation, but doesn't want the audits used to punish them.

Yet, prosecutors raise generalized concerns that even a qualified privilege can, in certain situations, make it more difficult to obtain information. They have also raised the specter of their not be able to pursue enforcement actions in certain situations. But how legitimate is a case if the only physical evidence of a violation is entombed in the four corners of the audit and the violation has been reported and corrected? What purpose does enforcement serve at that time? Isn't the public policy issue of compliance and not enforcement better served by encouraging self-assessment and timely correction than by gratuitous enforcement?

The EPA also believes that its recently issued enforcement policies sufficiently address the exposure of regulated entities that disclose actual or potential violation, but the policy does not bind EPA, much less the prosecutorial actions of Government agencies, such as the Department of Justice, nor does it prevent citizen suits or other third-party actions.

Most observers acknowledge the command and control models used for the past 30 years have helped us to move to our present level of environmental compliance. However, it is also recognized that in order to go to the next level of environmental compliance and protection, we need to find a new vehicle. For industry, one of the best methods to go beyond compliance is to conduct detailed environmental audits.

Senator Brown and Senator Hatfield and their staff are to be commended for taking a step to address a genuine environmental opportunity. They have recognized, as have numerous States across the country that have passed environmental audit laws, that there need to be assurances that large and small entities that audit their facilities find problems and correct them and are not increasing the prospects of increasing their civil and criminal liability.

Mr. Chairman, on behalf of the CEEC members, we believe it is time to turn the rhetoric down and form a bipartisan standpoint to work for the development of the environmental audit legislation which will improve compliance and enhance environmental protection.

Mr. Chairman, I thank you for the opportunity to be here today and I would be pleased to respond to any questions that you may have.

Senator BROWN. Thank you. We will have questions. We will go ahead with the other opening statements and then come back to you.

[The prepared statement of Mr. Gehl follows:]

PREPARED STATEMENT OF THOMAS P. GEHL

Mr. Chairman and members of the Subcommittee, my name is Thomas P. Gehl, I am Director of Environmental Engineering, Safety, Industrial Hygiene and the Chemical & Metallurgical Laboratory for the Kohler Company, Kohler, Wisconsin. The Kohler Company is a 122 year old privately owned Company in Kohler Wisconsin. It is the largest U.S. producer of bathroom fixtures as well as a producer of fine furniture, small engines, generators and specialty tiles. Kohler Company employs approximately 16,000 associates world-wide. There are approximately 7,000 employees in Wisconsin. Kohler was the recipient of the 1994 Wisconsin Business "Friend of the Environment" award, the 1995 and 1996 award winner for "Wisconsin Governor's Award for Environmental Excellence."

I have prepared a longer written statement and would respectfully request that it be entered into the record of this hearing.

I am here today as a member of the Board of Directors of the Corporate Environmental Enforcement Council, Inc. (CEEC), an organization of 20 diverse companies with strong commitments to the environment and environmental compliance programs. CEEC is comprised of senior environmental managers and corporate counsel from a wide range of industrial sectors and focuses exclusively on civil and criminal environmental enforcement public policy issues. At the same time, I want to acknowledge that there have been many in the business community who have worked to support environmental audit and voluntary disclosure legislation at both the federal and state level and one of the groups that has been a leader in this effort is the National Association of Manufacturers, an organization with which I am proud to be associated. I appreciate the opportunity to testify before you today in support of many of the concepts embodied in S. 582, the "Voluntary Environmental Audit Protection Act."

Mr. Chairman, CEEC's members are supportive of strong environmental enforcement programs directed at those who willfully and intentionally violate our nation's environmental laws and cause environmental harm. Yet, we are also concerned that environmental enforcement often serves its own interests rather than the goal of environmental protection. When this occurs enforcement itself creates serious obstacles to auditing and innovation for those who want to work with the government, and desire to go beyond compliance.

CEEC believes that the type of legislation that is being considered today offers a unique opportunity to eliminate many of these problems. CEEC believes that properly crafted legislation is long overdue and urgently needed.

CEEC has carefully considered issues relating to auditing and voluntary disclosure. Without question, the failure to have in place adequate and certain protections for voluntary audits and voluntary disclosures has created strong disincentives to environmental auditing. The current lack of such protection also has a chilling effect which, most often limits the utility and intensity of audits that are undertaken.

Mr. Chairman, a business, university, governmental entity or any other responsible regulated entity that audits—as well as their management and environmental personnel—should not be in a position of greater potential liability than a regulated entity that does not audit. The overriding goal of the environmental laws, and of the Environmental Protection Agency is—quite simply—the protection of human health and the environment. EPA's enforcement policy should further that goal. Given the acknowledged environmental and compliance benefits of environmental auditing and voluntary disclosure, CEEC believes that this is the type of federal policy that Congress should be supporting. We would respectfully request that this Committee take steps necessary to ensure that responsible members of the regulated community that conduct environmental self-evaluation and disclose potential non-intentional violations do not create or expand their environmental civil or criminal liability, or the liability of any individual.

Most importantly, I am here because I see a very important opportunity for the environment that could be lost in a cloud of rhetoric and skepticism, but for the bal-

anced approach that you and this Subcommittee are taking with regard to S. 582 and the issue of environmental auditing.

Mr. Chairman the concepts behind this legislation are very sound, are good for the environment and we commend the development of the legislation.

But the legislation has created a challenging situation. The regulated community wants to voluntarily audit their facilities, correct noncompliance and improve their operations but doesn't want the information contained in those audits used to punish them. Yet, prosecutors raise generalized concerns that even a qualified privilege can in certain situations make it more difficult to obtain information. They have also raised the specter of their not being able to pursue enforcement actions in certain situations. But how legitimate is a case if the only physical evidence of a violation is entombed in the four corners of the audit and by definition those problems have been reported and corrected. What purpose does enforcement serve at that time? Isn't the public policy issue of compliance and not enforcement better served by encouraging self assessment and timely correction than by gratuitous enforcement?

Also, EPA has repeatedly acknowledged that it does not have the resources to audit facilities. Yet the Agency wants industry to voluntarily conduct audits but wants to make sure they will have complete discretion to punish an entity that audits and reports as well as the individuals involved. The Agency also believes that its recently issued enforcement policy sufficiently addresses the exposure of regulated entities that disclose actual or potential violations. But the policy does not bind EPA, much less prosecutorial actions by government agencies such as the Department of Justice nor does it prevent citizen suits and other third party actions.

Most observers acknowledge the command and control models used for the past 30 years have helped to move us to our present level of environmental compliance. However, it should be recognized that in order to go to the next level of environmental compliance and protection we need to find new vehicles. For industry one of the best methods to move beyond compliance is to conduct detailed environmental audits.

The tension is extreme. Emotions and rhetoric boil at the expense of an effort to obtain the tremendous and acknowledged environmental benefits that can be achieved from this type of legislation. Congress needs to ensure that these environmental benefits are obtained, that ways to improve environmental compliance are not lost, that environmental enforcement does not restrict our nation's environmental progress and that the measures of success for environmental protection are not based purely on enforcement statistics.

Senator Brown and Senator Hatfield are to be commended for taking a step to address a genuine environmental opportunity. They have recognized, as have 17 states across the country that have passed some form of environmental audit laws, that there need to be assurances that large and small entities that regularly audit their facilities, find problems, fix them and report them are not increasing the prospects of increased legal liability.

The realities of the budget situation of our nation require new, flexible and common sense environmental solutions. Clearly the federal government will not have the resources to constantly inspect the hundreds of thousands of entities that should be complying with environmental laws. We must find a better way. We believe the limited protections offered by an audit privilege and voluntary disclosure law is a better way.

Mr. Chairman, on behalf of our CEEC members, we believe it is time to turn the rhetoric down and from a bi-partisan standpoint work to develop environmental audit legislation will improve compliance, enhance environmental protection and improve our environment.

THE TENSION BETWEEN AUDITING AND ENHANCED ENFORCEMENT

In recent years the use of environmental audits has grown both in terms of their comprehensiveness and sophistication. Although there are many different types of "environmental audits" EPA has defined "environmental auditing" as the "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements."

Currently, no environmental law requires regulated entities to institute formal auditing programs, although the Clean Air Act Amendments of 1990 requires that an owner or operator of a permitted major source certifies the compliance status. 42 U.S.C. §7414(a)(3)(1991). Nevertheless, extensive self-monitoring and reporting of certain emissions, discharges and hazardous waste practices, among other things, are required under federal statutes such as the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right-to-Know Act of 1986, and the Re-

source Conservation and Recovery Act.[1] Self-monitoring and reporting are often required at the state and local levels as well.

Both EPA and the regulated community recognize that environmental auditing can lead to significantly higher levels of overall compliance, improved environmental performance and reduced risk to human health and the environment. They can also be used to review a company's environmental management structure and resources. By way of example, audits often are used to:

Assess and reduce environmental health and safety risks required by regulation.

Anticipate upcoming regulatory requirements (which enables facilities to manage pollution control in a proactive manner).

Prioritize pollution prevention activities.

Help management understand new regulatory requirements and establish corporate policies.

Assess internal management and control systems.

Measure progress toward compliance.

Improve expeditious communication regarding environmental developments to facility personnel and, where appropriate, ensure effective communication with government agencies and the public.

Assure capable and properly trained personnel are available at all times to perform emergency and other environmental functions.

Evaluate causes for environmental incidents and determine procedures to avoid recurrence.

Assure sufficient budgeting for environmental concerns.

Provide a means for employee training and performance evaluation.

Maximize resources through recycling, waste minimization, and other pollution prevention measures, including process changes, that may benefit the environment.

Fulfill various other obligations, such as providing appropriate disclosure to their agencies (*e.g.,* SEC), and evaluating the environmental aspects of corporate or real property transactions.

Critical review through auditing is only one piece of an environmental management system. Other environmental management features often include:

Employee reporting systems to facilitate employee reporting of environmental problems.

Employee training programs.

Performance incentives. By incorporating bonuses and promotions based on a manager's history of environmental compliance, a company both provides an essential incentive for compliance and demonstrates a commitment to compliance efforts.

Voluntary disclosure of environmental violations where disclosure is not otherwise required by statute or regulation.

Industry and other members of the regulated community have been progressive with respect to auditing and the establishment of environmental management programs. Industry representatives have predicted that the next generation of environmental compliance will rely on regulatory self-evaluation systems—day-to-day management systems that include audits which lead to compliance and improved environmental performance.

Environmental audits themselves are becoming increasingly sophisticated. Audits have also been increasingly affected by the needs of multinational corporations and the desire for consistency among the environmental standards of different countries. Auditing techniques are constantly improving as well and are increasingly being included as part of value added business programs. Finally, companies are beginning to evaluate "environmental life-cycle audits" to determine the totality of impact that products and services may have on the environment.

At the same time, we are witnessing an increased tension between enhanced auditing and other innovative environmental management programs and the increased

---

[1] Although Congress has not yet included language protecting audits through legislation, it considered such protection in the context of the Clean Air Amendments of 1990. The Statement of Managers contained the following language: "Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to provide the knowledge element of a violation of this Act if—(1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused to be corrected of such violation as quickly as possible; and (3) in the case of a violation that presented an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment. 136 Cong. Rec. S16951 (Oct. 27, 1990)."

criminalization of our environmental laws. Today, the vast majority of regulated entities are managing themselves in an environmentally responsible manner, with only a handful operating "outside the system." Therefore, EPA's enforcement resources are increasingly focused on responsible corporate entities and individuals. Given the complexity of the environmental regulatory scheme and the myriad applicable regulations, 100% compliance is extremely difficult, if not impossible. These facts underscore the need for identifying new ways to ways to set enforcement objectives and measure enforcement and compliance success.

The primary concern with conducting an audit is the enhanced liability threat. This threat has led to a reluctance, especially on the part of smaller companies, to conduct audits, extreme caution in the scope of audits that are undertaken, frequent use of attorney-client privilege to protect audits, the writing of non-specific reports and a variety of other practices that greatly reduce the value of audits to a company.

All of this was confirmed by Price Waterhouse in a survey—"The Voluntary Environmental Audit Survey of U.S. Business," 28 (March 1995). According to Price Waterhouse, 75 percent of the corporate respondents had some sort of environmental auditing program. Yet, the survey also indicated that "there is still a perceived reluctance to expand audit programs, in the face of possible enforcement." Price Waterhouse noted, "when these companies were asked what factors detract from their willingness to expand their environmental auditing program, more than 45 percent of the respondents stated that information could be used against them in citizen's suits, toxic tort litigation, civil enforcement actions or as a road map of knowledge in a criminal enforcement action." In addition, nearly two thirds of the companies that now perform environmental audits stated that they would expand their programs if penalties were eliminated for problems that the companies themselves identified, reported and corrected.

The Price Waterhouse survey also indicated that 81 percent of the companies that audit try to protect their audits from disclosure pursuant to some sort of privilege, usually the attorney-client privilege. This necessarily increases the cost and complexity of audits, making them less useful for small and large businesses often reducing what could have been a constructive effect on an entire organization.

As there is no certain means of protecting audits or any means of ensuring that disclosures of inadvertent violations will not result in substantive fines or increased litigation, measures are often taken to ensure that the audits are circumscribed and the audit reports carefully written using vague terminology. Without question, this dramatically reduces the usefulness of audits and audit reports, and, as previously noted, environmental protection suffers as a result.

THE STATES HAVE TAKEN THE INITIATIVE

The growing concern over the use of environmental audit reports in enforcement proceedings, coupled with well-publicized instances of the imposition of severe penalties for disclosed violations, led various states to enact legislation protective of audit reports or disclosures, or both. Oregon enacted the first audit protection statute in 1993. Since then, 16 other states have enacted legislation, including Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, South Dakota, Texas, Utah, Virginia and Wyoming. Other state legislatures are now considering similar legislation. As you have heard from other witnesses today, these laws are having a strong and positive impact. But these state laws obviously do not reduce the need for similar actions at the federal level and that is why legislation like S. 582 is so important.

CEEC also remains concerned about EPA's continued critical and threatening position with respect to federal enforcement and the delegation of federal programs in those states whose legislatures have made the decision to foster environmental protection and improve compliance by enacting legislation which provides qualified protections for audits and/or voluntary disclosures. CEEC does not believe that EPA should put itself in the position of overriding state laws. The statements directed at states who have addressed or who are considering qualified audit protection and voluntary disclosure legislation assumes that those states are incapable of enforcing environmental laws and that they have not or will not apply legal accountability and compliance assurance in their policies and actions. To the contrary, we believe that these states are committed to environmental compliance and enforcement and that these innovative programs must be allowed to work in the States.

EPA's policy: A step in the right direction

"The Policy is not final agency action, but is intended solely as guidance. it is not intended, nor can it be relied upon, to create any rights enforceable by any party." Office of Enforcement and Compliance Assurance.

During the past two years CEEC worked closely with senior personnel from the Office of Enforcement and Compliance Assurance (OECA) on a number of key enforcement policy issues. We appreciated the openness of the Agency, particularly the efforts of senior officials in the OECA, and the dialogue that was developed on enforcement issues and policies, and the willingness of EPA to consider new and creative approaches to environmental compliance and enforcement.

At the same time, CEEC believed then and believes now that Federal audit protection and voluntary disclosure legislation is necessary because an agency's policy cannot, by definition and by limitations imposed on the agency's authority, eliminate all of the obstacles to self-policing. For example, EPA's policy cannot impact prosecutions by the Department of Justice or other federal agencies, citizen suits, toxic tort actions or state prosecutions. Moreover, EPA's policy does not offer any protection for individuals. It is a penalty mitigation policy. The Agency, in limiting its policy, and, by in fact attacking qualified audit and voluntary disclosure protections, makes the need for federal legislation even more imperative if protections for the environment are to be maximized.

During the dialogue on the policy in which our organization was pleased to participate, CEEC—relying on the expertise and experience of its members—discussed with EPA why the failure to have in place adequate and certain protections for audit reports and voluntary disclosures created obstacles to environmental auditing and had a strong chilling effect which severely reduced the utility of audits that are undertaken. As CEEC continues to emphasize, a responsible regulated entity that audits should not be in a position of greater potential liability than an entity that does not audit. Nor should its management or environmental personnel be put at greater risk.

In issuing the Final Policy, EPA emphasized that voluntary auditing and disclosure (i.e., self-policing) by the regulated community were—especially with EPA's limited resources—critical to achieving the environmental protection goals. Unfortunately, in the Final Policy (60 F.Reg. 66706, December 22, 1995) EPA chose to continue the limited penalty mitigation approach to these issues that it had adopted in the Interim Policy. While CEEC commended EPA for improving and clarifying penalty mitigation for responsible entities, this approach—which even in terms of penalty mitigation is in need of further revision—falls far short of the environmental protections EPA could have achieved through the adoption of a broader policy.

For example: A regulated entity that uncovers through auditing and promptly discloses and corrects a violation and satisfies all of the criteria set forth in the policy still faces potentially severe penalties; the Final Policy does not apply to individuals who will be left entirely unprotected; the Final Policy applies only to EPA, and as a policy it is not even binding on that Agency; and the Policy does not protect information provided to EPA from disclosure to other government agencies or third-parties, nor does it adopt an alternative approach that would allow such a disclosure but provide limited protection to those who disclose.

The very limited nature of the EPA policy, coupled with its exclusive focus on penalty mitigation, only underscores the need for comprehensive federal and state legislation if we are to achieve the environmental benefits that EPA seeks.

Addressing concerns of critics of the legislation

Critics of S. 582 have consistently made a series of generalized charges that represent their concerns about the legislation. These charges—while perhaps creating attractive sound bites—clearly misstate the facts and the intent of the legislation. These charges include:

1. The legislation amounts to "blanket immunity."

The legislation clearly does not provide for "blanket" immunity. But it does provide environmentally responsible entities with a qualified protection if the entity establishes that the violation was promptly corrected and disclosed to the appropriate governmental agency, and the entity provided all further relevant information requested by the agency. In addition there is no immunity for repeated violations.

2. The legislation protects "bad actors."

"Bad-actors" who intentionally violate environmental laws do not typically take the time to conduct voluntary self-audits, much less undertake the costly steps required to comply with environmental requirements in a timely fashion. In any event, it was never the intention of S. 582 to protect willful and intentional violations, and the legislation does not do that.

3. Environmental protection will suffer as a result of the legislation.

CEEC believes that the opposite is true. Effective environmental auditing typically is more probing and thorough than a regulatory compliance inspection, and therefore is more likely to uncover deficiencies or instances of environmental non-

compliance than an inspection. Moreover, in order to benefit from the voluntary disclosure component of S. 582 an entity must act quickly to correct any non-compliance. For this reason too, increased environmental auditing will result in increased compliance with environmental requirements, and ultimately improved environmental protection.

4. The legislation will not impact the behavior of regulated entities.

CEEC does not believe that this is correct. Audit protection/voluntary disclosure legislation will remove obstacles to the voluntary self-auditing process in several ways. First, entities that already perform voluntary environmental audits will be able to do so more candidly and thoroughly and thereby be more useful. Second, more entities will be encouraged to perform voluntary environmental audits. Third, more companies will go beyond compliance, undertaking evaluations that are not required and providing additional information to the government that will enable it to craft better regulations.

5. The legislation protects factual information about environmental violations from regulators.

The argument ignores the narrow scope of the protection in S. 582. The bill does not extend protection to any of the information that is required to be collected under environmental laws. Stated another way, the qualified privilege does not cover any routine sampling or monitoring data, or any information obtained from an independent source. Similarly the public's right to know about all of this information is not restricted in any fashion.

6. The legislation will prevent prosecutors from proving their environmental cases.

Because enforcement officials will continue to have access to all of the underlying data because EPA retains its full inspection and information gathering authorities the qualified audit protection will not have any effect on the ability of EPA or any regulatory agency to establish nonconformance with a regulatory requirement. Enforcement officials will continue to be able to inspect, sample and monitor an entity's compliance under existing environmental laws, and entities will still be required to comply with existing recordkeeping and reporting requirements.

Conclusion

Removing the obstacles and providing the proper types of incentives for voluntarily conducted environmental audits is one of the most important policy actions that can positively impact our environment. Administrator Browner to her credit often cites the need to use 'Common Sense' approaches to development of effective environmental policy. Providing incentives and protection from prosecution for those in the regulated community that are good citizens and are trying to find, report and fix their environmental problems is 'Common Sense'. Mr. Chairman, we look forward to working in bi-partisan fashion to more clearly define and refine federal audit legislation that is good for the environment while at the same time protecting our employees and those in the regulated community committed to environmental compliance and protection.

THOMAS P. GEHL, KOHLER CO.

Director of Environmental Engineering, Safety, Industrial Hygiene and the Chemical & Metallurgical Laboratory for the Kohler Company, Kohler WI.

Tom is Vice-Chair/Chair Elect for the Environmental Law Section of the Wisconsin State Bar; on the Editorial Advisory Board for the Wisconsin Environmental Law and Regulation Report; is Chairman of the RCRA Task Force and a Member of the Environmental Quality Leadership Committee for the National Association of Manufactures; serves on the U.S. Technical Advisory Group 207 for the creation of the ISO 14001 standard; is a Member of the Warton Risk Management Roundtable on ISO 14000; serves on the Wisconsin ISO 14000 Working Group; is a member of the Corporate Environmental Enforcement Committee in Washington, DC. Mr. Gehl was also the Editor of the Wisconsin Environmental Newsletter on the Audit Privilege, is Chairman of the Wisconsin Environmental Pro Bono Project and has served on several Wisconsin Department of Natural Resources committees to review regulations. He is a frequent lecturer on Environmental and Occupational Health issues.

Mr. Gehl has over 18 years of experience on environmental issues. He received BA from Lawrence University in Appleton Wis., holds a Law Degree from Marquette University and has completed his course work for MS in the School of Public Health at the University of Minnesota.

Kohler Company is a 122 year old privately owned company in Kohler Wisconsin. It is the largest producer of bathroom fixtures as well as producing fine furniture,

small engines, generators and specialty tiles. Kohler real estate developments include the American Club Hotel (the only AAA Five Diamond resort in the midwest) Black Wolf Run golf course which is ranked #1 in the midwest and in the top 50 courses in the United States. Kohler Company employs approximately 16,000 associates world wide and had sales of over $1.9 Billion in 1995. There are approximately 7000 employees in Wisconsin.

Kohler was the recipient of the 1994 Wisconsin Business "Friend of the Environment" award, the 1995 and 1996 award winner for the "Wisconsin Governor's Award for Environmental Excellence" and was named a finalist for the National Association for Environmental Management "Environmental Excellence Award" in 1995.

CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, INC.

What Is It? CEEC is an organization comprised of corporate counsel and management from a wide range of industrial sectors that focuses exclusively on civil and criminal environmental enforcement public policy issues.

What Does It Do? CEEC: Provides a forum for the review and discussion of current enforcement issues and the development of constructive recommendations on civil and criminal environmental enforcement policies. CEEC to date has addressed: appropriate protection for audits and related disclosures; federal sentencing guidelines; permit certifications; enforcement language in specific legislative proposals; development of alternative measures of enforcement success; supplemental environmental projects; federal overfiling; the overcriminalization of environmental laws; enforcement implications of ISO 14000 and enforcement initiatives; is a sophisticated, cross-industry organization providing comments and serving as a resource to the Administration and Congress; focuses exclusively on enforcement provisions of environmental legislation; provides an opportunity for corporate counsel and management to share experiences and information on programs, policies, and trends, relating to environmental compliance and enforcement; serves as a vehicle for the review of precedent setting environmental enforcement administrative and judicial actions; and serves as a resource to state and local groups as well as numerous trade associations on federal and state environmental enforcement issues.

Members: AT&T, The BFGoodrich Company, Caterpillar, Inc., Coors Brewing Company, DuPont, Elf Atochem, North America, Inc., Eli Lilly and Company, Georgia-Pacific Corporation, Hoechst Celanese Corporation, ITT Industries, Kaiser Aluminum & Chemical Corporation, Kohler Company, Lockheed Martin Corporation, Owens Corning, Pfizer, Inc., Polaroid Corporation, Procter and Gamble, Textron, Westinghouse Electric Corporation, and Weyerhaeuser Company.

For More Information: Please contact Steve Hellem, Executive Director, CEEC, 1100 New York Avenue, NW, Suite 810, West Tower, Washington, DC, 20005 (202) 289–1365 or CEEC's counsel, Paul Wallach, Hale and Dorr, (202) 942–8429.

Senator BROWN. Mr. Riley.

STATEMENT OF JOHN ALOYSIUS RILEY

Mr. RILEY. Thank you, Mr. Chairman. My name is John Riley and, as you said, I am the Director of the Texas Natural Resource Conservation Commission [TNRCC] Litigation Support Division. I also have filed written testimony and I ask that that be accepted for the record.

Senator BROWN. Without objection, all the statements will be included in full in the record.

Mr. RILEY. Thank you, Senator.

I do, in my capacity at the TNRCC, administrative, criminal and civil environmental law enforcement. My division serves as legal counsel to approximately 835 field operations and enforcement staff devoted to compliance with environmental laws.

I am here today to express support for Federal environmental audit privilege and immunity legislation that enhances traditional enforcement mechanisms. I am also here on behalf of Texas to express some concerns about what effect the lack of Federal legislation might have on States that have enacted these laws.

Let me begin by just a brief overview of the Texas law. It has the two components that are also contained in the legislation before the subcommittee. It contains both a privilege and immunity aspect. The privilege is a qualified privilege. It contains provisions that, in my estimation, guarantee that the privilege will not be abused in any true sense or in any theoretical sense and prevent legitimate companies that are auditing—it will not prevent them from protecting that information and it will not prevent companies that are not legitimately auditing and legitimately coming into compliance from insulating information from our discovery.

I would also like to point out that the privilege would only attach, and only attaches under Texas law, to information that is voluntarily generated, information that is not otherwise required by any Federal or State regulation, rule, permit or any other authority. Furthermore, the privilege is additionally qualified by the one qualification that I think is most significant in this area, and that is it is lost if compliance is not achieved with reasonable diligence.

The immunity aspect of Texas law competes to some extent with the privilege aspect, and that is to say that under our immunity section—I would also point that immunity in Texas law extends only to punitive sanction. It does not extend to various criminal mens rea, which I will come to later in my talk. It does not extend to all violations that might be discovered in this process.

The immunity requires that a company give notice to the agency in advance of conducting an environmental audit that it intends to do so, and those notices, I would like to point out, are public information. The public is aware of what companies seek immunity under Texas law and are coming forward and doing environmental audits.

Furthermore, the disclosures that are also made under section 10 in pursuit of immunity are also public information. The violations that are being disclosed to the agency that much of the discussion about secrecy has been about are also available to the public. In the event the disclosure is not specific enough to fully illuminate what violations are being disclosed, the violations are captured in the entity's compliance history. It does not go to criminal states of mind, to knowing, intentional, or significant reckless behavior. Again, I would point out that the immunity, as with the privileges, is dependent on reasonable response and due diligence in coming into compliance.

To date, Texas has some, I think, very positive results to report. Under our legislation, there are approximately 180 entities that have given us notice of intent to conduct audits. Of those entities, approximately 30 have made disclosures to us under the protections of our immunity provisions. Much of these audits have been multi-media, and I emphasize that point only because it is an emphasis of EPA that multi-media and more multi-media evaluations and inspections be done.

My concern with the lack of Federal legislation is that I am concerned with recent memos and policies of EPA of the potential for denial of the approval of State programs, as well as a reconsideration of delegated programs and a potential denial of future delegated programs. I would point out that in my discussions with EPA it is clear to me that the EPA policy is not a valid source of com-

parison in comparing State law to EPA policy. I have been told that the EPA policy is separate and distinct from the statutory requirements under Federal laws, and therefore is irrelevant in terms of discussions in making comparisons between Texas law and Federal enforcement policies.

I think that a lot of what has been discussed here today—and I apologize for running a little over time—really refuses to go to the next level of analysis that I think is appropriate in this area. The next level of analysis, in my view, is what is gained by an agency in these disclosures and in this process, specifically in Texas' experience.

The agency knowledge is increasing, both the specific knowledge of any facility as well as the generalized knowledge of an industry. I believe that a facility's knowledge is also expanding in that same area both specifically to their own facilities and for larger companies through other facilities that they may not have audited.

The criminal implications I am well aware of. As a former criminal prosecutor, I am appreciative of a lot of the remarks here. Simply stated, Texas law would not have extended any of its immunity protections to any of the examples that have been put before the committee this morning. If there is an issue on the fraudulent use of these privileges, then I suggest that the legislation consider criminalizing that use and that the fraudulent use be the equivalent of committing the original act.

If we are going to measure effective enforcement in terms of how many cases, how many dollars we recover, rather than what compliance we have achieved, then I suggest we do a disservice to the enforcement process and the overriding goal of achieving compliance.

Senator BROWN. Thank you; very helpful.

[The prepared statement of Mr. Riley follows:]

PREPARED STATEMENT OF JOHN ALOYSIUS RILEY

SUMMARY OF TESTIMONY

The Texas Natural Resource Conservation Commission's ("TNRCC's") goal is to pursue an effective and efficient enforcement program that maximizes voluntary compliance, ensures that potential polluters are informed of their environmental responsibilities, and compels compliance through legal action when necessary. Resource-restricted environmental regulatory agencies are not capable of inspecting every regulated entity on any regular basis and the TNRCC is meeting its commitment to the people of our state, and the environment, by wisely applying the precious resources we have devoted to environmental law enforcement. Therefore, as with any other means or method intelligently applied, the TNRCC welcomes and supports our state's environmental audit law and other such legislation as additional, useful and effective tools in increasing compliance with environmental laws. The Texas real-life results show that significant gains in the struggle to achieve greater compliance with environmental laws are available through audit legislation, particularly at a time when governmental resources are spread thin.

My name is John Aloysius Riley and I am the Director of the Litigation Support Division at the Texas Natural Resource Conservation Commission ("TNRCC"). The TNRCC is a multi-media environmental agency covering all air, water and waste-related activities. My division acts as legal counsel to our Executive Director in administrative and civil enforcement proceedings. The division's staff attorneys prosecute all environmental administrative enforcement actions in the State of Texas and provide support to the Texas Attorney General's Office in District Court proceedings. Additionally, the Special Investigations Unit of my division conducts investigations into criminal violations of state and federal environmental laws and provides support in these prosecutions to United States Attorney's Offices in Texas

as well as local District and County Attorneys. The head of this Special Investigations Unit chairs a state and federal multi-agency criminal investigative task force.

The TNRCC's goal is to pursue an effective and efficient enforcement program that maximizes voluntary compliance, ensures that potential polluters are informed of their environmental responsibilities and compels compliance through legal action when necessary. The TNRCC believes that strong traditional enforcement of environmental laws is necessary to guarantee that the public health and environment receives the benefits of the promises embodied in environmental statutes, regulations, and permits. To improve the condition of our environment, we must have compliance with governmental requirements.

In fiscal year 1995, the TNRCC more than doubled its enforcement orders without increased resources devoted to the effort. In this fiscal year, we are on track to essentially eliminate an enforcement backlog that has persisted for many years, while not relaxing our high enforcement program standards. Today, our actions are more current and our per-case enforcement penalties are on the rise. These achievements are due in large part to a reorganization and consolidation of the enforcement function at the TNRCC. The increased efficiency and effectiveness results from a sincere rededication of the agency to the overriding goal of increasing compliance.

The legal staff dedicated to enforcement at the TNRCC includes 25 attorneys, counting myself and two supervising senior attorneys. My criminal unit consists of one attorney in Austin and nine full-time criminal investigators located across Texas. Our primary client division is the Office of Compliance and Enforcement, comprised of approximately 835 staff members involved in field investigations and enforcement. Of the 835, 677 are located in 15 regional offices throughout the state.

Meanwhile, the "community" that we are responsible for regulating numbers in excess of 200,000 and continues to grow. Unquestionably, the people and resources dedicated to the enforcement of environmental laws pale in comparison to the size of the task. I have every reason to expect that other states and the federal government are in a similar position.

I have burdened the record of this proceeding with this summary of the TNRCC enforcement efforts to make two points: resource-restricted environmental regulatory agencies are not capable of inspecting every regulated entity on any regular basis and the TNRCC is meeting its commitment to the people of our state and the environment by wisely applying the precious resources we have devoted to environmental law enforcement. Therefore, as with any other means or method intelligently applied, the TNRCC welcomes and supports our environmental audit law and other such legislation as additional, useful and effective tools in increasing compliance with environmental laws.

The Texas law became effective on May 23, 1995, and while I still consider it preliminary, the results are completely positive. A brief analysis of some features of our law will aid in putting the returns in proper perspective.

The Texas law contains both privilege and immunity provisions. The audit privilege attaches automatically. There is no requirement that a company do more than conduct an audit to obtain this protection. The scope of the privilege is broad and extends essentially to all materials created in the course of an environmental self-evaluation. However, there are three major caveats to this discovery protection: (1) the privilege does not extend to any materials or reports that are required to be kept under the authority of federal or state law; (2) the privilege does not extend to any observation of the actual physical events of violation; and (3) the privilege may be overcome in an administrative, civil or criminal context where a tribunal determines that appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence after discovery of the violation. Therefore, the Texas privilege is appropriately qualified and limited.

"Immunity," as it is termed in the Texas law, is a complete relief from any punitive sanction but it is not necessarily relief from all enforcement action. Where injunctive corrective provisions are deemed appropriate by the agency, a self-disclosed violation may be pursued to an enforcement order. The immunity provision of Texas law competes in some measure with the privilege gained. First, the notice of an entity's intent to conduct an audit, a threshold requirement for penalty relief, is public information. Second, the ultimate disclosure of a violation, if one is detected in the audit and a company seeks penalty immunity, is also public information and must be recorded in the company's compliance history.

In less than one year, the TNRCC has received approximately one hundred and eighty notifications of intent to conduct a voluntary environmental audit. These entities include cities; universities; navigational districts; the United States Air Force; newspapers; food and food products companies; barge and ship cleaning operations; paper and paper products manufacturers; automobile manufacturers; computer and computer parts manufacturers; electric utility services; cement manufacturers;

metal manufactures; waste disposal companies; petroleum refineries; petrochemical plants; and chemical manufacturers. A majority of the notices indicate that the audits will be multi-media, covering all environmental regulations and permits. Of the over 33,000 different types of inspections conducted per year, the TNRCC is only able to conduct between 10 and 200 multi-media inspections—the remainder are single-media inspections. Therefore, through use of the environmental audit tool, multi-media evaluations encouraged by EPA are significantly enhanced.

Since May of 1995, approximately thirty entities have disclosed violations to the TNRCC in pursuit of penalty relief. The majority of violations that have been illuminated in this process are air violations, ranging from recordkeeping problems to exceedances that necessitate permit amendments or re-evaluations of grandfathered exemptions. Several companies have reported inadequacies with air emissions inventories and toxic release inventories. Others have reported inadequacies with spill prevention and countermeasures containment plans; contingency plans; and personnel training programs. In one case a company reacted quickly to the discovery of falsified operating log entries by firing the responsible employee and retraining the other employees involved in data entry.

Simply put, many of these violations would not have been detected in a routine compliance inspection. Voluntary stack tests and other expensive sampling protocols which go above and beyond the regulatory requirements are the foundation for many of these disclosures. Erroneous log or other data entry problems are difficult to detect through any means other than a self-audit. In addition, a good number of the audits covered timeframes from more than a decade ago. Although not hindered by a Statute of Limitations, the TNRCC and other Texas agencies would not normally review records of this vintage when conducting inspections.

All of these disclosures have occurred without disruption of the normal enforcement process. We have conducted our inspections as scheduled; brought enforcement actions where appropriate using required reports and our own information; and diligently scrutinized the regulated community as our statutes and delegation authority require. Yet, without regard for our real-life results and Texas' general enforcement record, EPA has withheld the final approval of our Clean Air Act Title V program and is questioning delegation of federal regulatory authority on the basis that this law makes our enforcement authority inadequate in light of federal statutory requirements.

EPA has stated that the statutory requirements for delegation and approval are unaffected by EPA's own enforcement policies. Presumably, even if a state enacted legislation identical to EPA's self-disclosure policy, a state's enforcement authority might be viewed as diluted enough to require EPA to withdraw delegated programs. Thus, the recently promulgated EPA policy provides no relief on the issue of delegation to states with audit privilege and immunity laws. Comparisons of aspects of our law to the EPA policy, even where the EPA policy provides greater penalty mitigation, have been dismissed as irrelevant to the statutory enforcement authority requirements. This irony cannot be intended by Congress and this "do as we say, not as we do" position forces the issue into the legislative arena and calls for a federal law as the most appropriate solution to this anomaly.

While we remain confident that we can reconcile our law with the federal statutory requirements, that confidence is based on the presumption that every effort will be made on both sides to do so. Stretched or strained construction of federal and state laws will frustrate this process endlessly.

Using EPA's April 5, 1996, Title V guidance document as an indicator, it is apparent that some stretching or straining may already be occurring. For example, with respect to the audit privilege, EPA has raised the audit privilege discovery and evidentiary limitation to the level of substantive law. In essence, EPA is asserting that a state's environmental enforcement authority must be evaluated by examining the means available to prove violations. The logical extension of this premise is that all state procedural laws, evidentiary laws and rules of Court will take on this newly announced significance and need to be evaluated in comparison to the federal code.

Apparently, this is true even where the evidentiary protection, as in Texas, extends only to information that is voluntarily created and exceeds that which regulatory authorities require be kept. There is a fundamental flaw in any regulatory enforcement scheme that depends heavily on information that is not required to be generated and, therefore, may not exist. Furthermore, to condition delegation or approval of important environmental programs on a state's ability to use this phantom information is patently unfair. One must wonder whether we are confronting legal arguments or a basic philosophical disagreement with the concepts of privilege and penalty immunity.

In the past, companies have attempted to use the attorney-client privilege, along with the attorney work product doctrine, as a method of protecting their environ-

mental audits from disclosure. With attorneys guiding and coordinating the environmental audit, some entities have been successful in keeping information about their compliance with environmental statutes and regulations from other parties. The attorney-client privilege is a long-recognized doctrine with the primary purpose of promoting full and open communication between lawyer and client. The need for open and full communication is no greater anywhere than in the area of environmental compliance.

The Texas audit privilege is more limited than the attorney-client privilege. The attorney-client privilege, once established, provides unqualified protection for an audit conducted within its scope, regardless of what remedial actions follow the discoveries. The Texas law allows a company to retain the audit privilege only if appropriate efforts to achieve compliance are made. Thus, a party seeking to retain the protection of the audit privilege must focus on correcting the problem.

Much has been said about the potential for abuse of these offered protections. The privilege and immunity provisions seem particularly troublesome to criminal prosecutors. Texas law does not extend the offer of immunity to intentional, knowing or more significant reckless criminal conduct. Perhaps, these generalized concerns are misplaced as applied to the Texas statute. It is curious that at least one highly respected law enforcement official in New York has generally decried privilege and immunity legislation, although at one time he offered immunity from felony prosecution and mandatory jail time for a guns-for-cash amnesty program. The benefits to law enforcement of self-policing and immunity programs have been historically recognized in institutions from the public library to District Attorney's Offices. For the most part, abuse in the criminal area is limited by the practical improbability that a company acting with criminal intent would commit a violation, audit its criminal act, apply for immunity and return to compliance through remediation of the contamination or situation created in the first place. While these points do not seem lost on prosecutors, the Department of Justice remains adamantly opposed to privilege or immunity legislation. This objection seems to be based on hypothetical scenarios rather than actual examples.

The Texas real-life results show that significant gains in the struggle to achieve greater compliance with environmental laws are available through audit legislation, particularly at a time when governmental resources are spread thin. Perhaps the most important change in the enforcement dynamic that I have experienced as a result of our audit law is the "getting-on-to-solutions" attitude that inherently accompanies each disclosure. The violation is not disputed. No legal posturing is necessary. We begin negotiation at a point that is too often delayed in traditional enforcement processes. Protracted arguments about questions of interpretation, the proper application of relevant factors in penalty calculations, legalistic wording of enforcement orders with little benefit to either side and, of course, the penalty amount itself do not delay compliance and remediation. The environment benefits.

Senator BROWN. Mr. Johnson.

STATEMENT OF VICTOR S. JOHNSON

Mr. JOHNSON. Good afternoon. I am Torry Johnson, district attorney general for Metropolitan Nashville and Davidson County, TN. I have been fortunate to hold this elected office since 1987, and prior to that I was an assistant prosecutor for approximately 10 years.

Today, I am here representing the National District Attorney's Association as the chairman of its environmental crime prosecution committee. I want to thank this subcommittee for the opportunity to express the opposition of this Nation's local prosecutors to the creation of a criminal privilege for environmental self-audits. Our association is vitally interested in this debate, since environmental crime is really a local issue because the large majority of criminal prosecutions have been handled by this country's local prosecutors.

At the outset, let me be clear that the National District Attorney's Association is concerned only with those provisions of the proposed legislation that will have the practical effect of handicapping prosecutors and frustrating legitimate law enforcement activities. To that end, the board of directors of the association, representing

each State in the Union, has passed a resolution expressly condemning a privilege for environmental self-audits. I have it today and it has been made part of the record.

Our association is opposed to the creation of a privilege that will only result in these already difficult cases becoming that much more expensive, complex and time-consuming to prosecutors and the people of our communities. As a matter of fact, it is vastly more likely that a business will become involved with regulatory agencies or with civil litigants than it is that they will ever be prosecuted for an environmental crime.

As prosecutors and as citizens, we applaud reasonable efforts to encourage, not punish, corporate responsibility in identifying and rectifying environmental problems. However, as prosecutors sworn to uphold the criminal law, we deplore provisions that go beyond this goal and that seek to cripple law enforcement. Prosecutors need to be free to pursue the environmental outlaw, whether it is the midnight dumper who abandons 55-gallon drums of waste along roadsides, the unscrupulous business that illegally stores waste onsite or pumps it into the public sewage or storm water system, or the bogus environmental professionals who use fraud and subterfuge to mislead their own clients or unsuspecting third parties.

These are the businesses and individuals that America's prosecutors need to be able to prosecute without being hobbled by an environmental self-audit privilege. This well-intended but misguided shield that will purportedly defend responsible corporate America can be quickly turned into a devastating sword in the hands of the environmental criminal, their lawyers, experts and consultants. The adverse impact of such a privilege is limited only by the imagination of those who would seek to thwart a legitimate investigation into such wrongdoing.

I find it ironic that this same committee is looking at an exclusionary rule reform to permit the use of evidence in criminal prosecutions involving ordinary citizens, while at the same time it is also looking at the means to restricting availability of evidence of prosecutions that might involve the business community. The National District Attorney's Association supports the efforts of this Congress and this subcommittee to reform the exclusionary rule for the same reasons that we oppose the legislation before you today. Both the exclusionary rule and an environmental self-audit privilege withhold the truth.

If corporate America has a genuine complaint about the way they are treated by the regulatory community or by the civil justice system, then I am certain that appropriate remedies can and will be fashioned. But we find no validity to the claim that law enforcement is using and abusing environmental self-audits to pillory unfairly a responsible corporate citizen.

In fact, I am not aware of any such case where an environmental self-audit was used to criminally prosecute a company which identified a problem, disclosed its existence and remedied the consequences. In such a situation, perhaps the company found itself subject to regulatory action or civil suit, but not to criminal prosecution.

Privileges in the criminal law have been infrequently created and narrowly construed so as to strike a reasonable balance between the interests of the communications to be guarded and the public's interest to be protected. As Chief Justice Burger noted in the decision of *United States* v. *Nixon*:

> These exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

The policy behind the infrequent creation of privileges has been succinctly described by Chief Justice Burger in that same decision.

> The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all facts within the framework of the rules of evidence.

The very concept of a privilege under criminal law has also a sacred aura in that it restricts the availability of knowledge to those seeking the truth. Thus, the privilege has been limited to those personal relationships that we believe are of great import. Traditionally, these have included the relationship between husband and wife, the priest and penitent, and the attorney and the client. I would most strongly suggest that the business records of a corporation do not rise to this level of importance.

The role of the local prosecutor in America is a unique one. In order to carry out the serious obligation of the office, the prosecutor must exercise both judgment and discretion in determining where time and scarce resources can best be used for the benefit of the public at large. Egregious violators with no regard for public safety are the most deserving of criminal sanctions. These are the persons and businesses that give the well-meaning and conscientious corporate citizen an undeserved black eye.

On behalf of the district attorneys of this country, I appreciate the invitation to appear and express our position. We stand ready to protect our precious environment and to see that those who do it harm are punished to the fullest extent of the law. We respectfully urge that this body not enact legislation that will prevent us from carrying out our sworn responsibility.

Thank you.

Senator BROWN. Thank you.

[A resolution from the National District Attorneys Association submitted by Mr. Johnson follows:]

RESOLUTION

ENVIRONMENTAL PROTECTION COMMITTEE

Whereas, the Nation's District Attorneys are the primary criminal enforcement agencies; and

Whereas, criminal enforcement of environmental offenses became necessary since civil and regulatory enforcement has not sufficiently deterred these offenses; and

Whereas, four states (Colorado, Indiana, Oregon, Kentucky) currently have self audit legislation that creates an immunity-type privilege for the information contained in a self audit; and

Whereas, the continued use of self audits coupled with any type of work product or immunity privilege, confuses the criminal prohibitory laws with the civil regulatory laws; and

Whereas, business offenders are able to pass the cost of civil and regulatory enforcement efforts on to the consumer as opposed to criminal enforcement which includes an alternative of incarceration for individuals, including corporate officers, that cannot be passed along; and

Whereas, deterrence of environmental offenses is of primary concern to the citizenry, including other law abiding businesses, who spend the time and money complying with environmental statutes and cannot compete with businesses operating in an unlawful manner; and

Whereas, environmental self audits coupled with any type of work product or immunity privilege are a flawed enforcement tool because they represent the self interests of a large corporation; and smaller companies and businesses usually do not have the resources to compile self audits and therefore find it difficult to compete in the market place; and

Whereas, allowing the use of self policing audits coupled with any type of work product or immunity privilege creates a type of "safe harbor" and helps entities insulate themselves from criminal prosecution; and

Whereas, there are no similar self policing type audits with privileges in any other area of the criminal law; and

Whereas, the environmental self audit is different from other self policing conduct (such as tax returns) in that there is a remedy available for other conduct (such as paying back taxes), but enforcement agencies cannot fully remediate the effects of most environmental offenses; and

Whereas, self evaluation audits prepared by an individual or company contain certain potential prosecutorial problems such as attorney work product doctrines, qualified immunity privileges and statutory immunity privileges; and

Whereas, the United States Environmental Protection Agency will be holding public hearings to determine its position concerning self audit legislation on a national level;

Therefore be it resolved, that, the National District Attorneys Association opposes any regulation or legislation involving environmental self audits which provides for privileges (statutory or common law), immunity or qualified immunity.

Adopted by the Board of Directors July 23, 1994 (Newport Beach, California).

Senator BROWN. Ms. Bangert.

STATEMENT OF PATRICIA S. BANGERT

Ms. BANGERT. My name is Trish Bangert. I am the senior deputy solicitor general in the attorney general's office in Colorado. I appreciate the opportunity to be here to testify regarding S. 582, and I am testifying on behalf of the attorney general, Gale Norton.

As you well know, Colorado has an audit privilege and immunities law. That law grants an immunity, a documentary and testimonial immunity—I am sorry—privilege, for environmental self-audits in cases where the audits have revealed violations that have been corrected. It also grants immunity from some criminal penalties, from civil and administrative penalties, where again violations have been discovered in the course of an audit, they have been reported and they have been corrected. The law has a great many features to ensure that the statute is not misused and to protect the environment, and I will talk about those a little later.

Colorado was the first State to consider immunity privilege legislation in 1989. It was the first State to pass a bill that contained both provisions in 1994. The Colorado legislation and Oregon legislation were really the beginning of a trend. At this point, 17 States have some sort of either privilege and/or immunity legislation. Actually, I was at the same conference that Steve Herman was at last week, an environmental summit of attorneys general, and my perception of that conference was that there was general agreement that there have to be some sort of incentives for voluntary compliance and that some sort of an immunity provision is fairly well accepted among the different States. Even the States that didn't have statutes on immunity had administrative—or some of the States had administrative processes whereby limited immunity was grant-

ed in certain cases. Those States include, for example, the State of Minnesota.

I am here today to say that it is time for Federal legislation in this area, and let me, if I may, give you some reasons for that. I think that the Colorado program is working pretty well. I think the Colorado program has been successful, but I think that the full implementation of the program is not going to occur until there is some Federal legislation, and there are a couple of reasons for that.

Even though we have had a number of companies that have come forward—we have had, actually, 15 companies come forward under the Colorado law, disclose violations and correct those violations—I suspect that companies are not coming forward because of the threat of EPA over-filing. EPA has quite specifically said in the case of Colorado, and made threats in the case of other States, that they will scrutinize enforcement in States with audit privilege and immunity bills more closely than in States that don't have those kinds of statutes. EPA, as a matter of fact, in its final policy has indicated that that scrutiny is going to be more extensive.

I think that the problem with that is that corporations can come forward under the Colorado and they can disclose and that then becomes a matter of public information. They might get immunity under the Colorado law, but it is actually handing the Federal Government a blueprint for prosecution.

Another problem that we have is the same problem that Texas mentioned, and that is the threat of yanking of our delegated programs. Recently, we went to the EPA to ask them for permission, or for delegation of some water programs. EPA came back and basically gave us two choices, and that is either to prove that 139, our privilege and immunities bill, does not interfere with our enforcement authorities or to sign an MOA with EPA agreeing that EPA can do additional enforcement authorities, has additional enforcement authorities in Colorado and will do additional over-filing. We tried to explain to EPA that we thought that our enforcement authorities were still there, but they were not convinced by that and now we are discussing the terms of an MOA.

I guess for those reasons we really believe that some Federal legislation is necessary at this point. We think that S. 582 is a good start. We have some concerns about it and we would be happy to work with staff to resolve those concerns. If you have any questions, I would be happy to answer them.

[The prepared statement of Ms. Bangert follows:]

PREPARED STATEMENT OF PATRICIA S. BANGERT

SUMMARY

We can all agree that the intended effect of environmental protection statutes passed over the past three decades is to improve and protect the natural and human environment. The President's National Performance Review concluded that many of these laws, however, place a very real cost burden on local governments.

As you may know, Colorado has enacted a statute that sets out incentives for regulated industries to perform self-audits and to disclose violations found in those evaluations. Specifically, the statute allows an evidentiary and testimonial privilege for self-audits that are followed by prompt correction of any environmental violations found. Further, the law allows immunity from certain civil and criminal penalties for violations reported and corrected.

Colorado's environmental audit law is based on the assumption that business will respond positively to the incentives offered. In the long run, we expect that environmental compliance will improve. This is especially true for small businesses.

Colorado's law has been successful in bringing the regulated industry and regulators together, in encouraging audits and disclosures of violations, in having violations corrected, and in improving the environment. Two barriers, though, to full and effective implementation of state privileges and immunities laws are the threat of federal enforcement action and the threat of federal withdrawal of state delegated programs.

Only federal legislation providing for parallel privileges and immunities provisions can eliminate the uncertainty for businesses and states. For that reason, we support legislative efforts such as S. 582. We would be happy to work with staff to ensure that this or other federal legislation compliments, rather than detracts from, state authorities and programs.

Congress should enact a law like S. 582. Significant compliance with our environmental laws cannot be achieved through utilization of traditional enforcement methods, such as command and control alone. We must establish programs that offer positive reinforcement to businesses if we are to make any gains in environmental compliance. It is time that environmental laws passed in the 1970s are made workable for the realities of the 21st Century.

Mr. Chairman, members of the subcommittee, my name is Trish Bangert, I am the Senior Deputy Solicitor General at the Colorado Attorney General's Office. Colorado Attorney General Gale Norton asked me to appear before you to discuss S. 582. We appreciate the opportunity to testify before this subcommittee on this important piece of legislation.

We can all agree that the intended effect of environmental protection statutes passed over the past three decades is to improve and protect the natural and human environment. The President's National Performance Review concluded that many of these laws, however, place a very real cost burden on local governments. The EPA estimates that, by the year 2000, local governments will need to spend nearly $44 billion annually to meet existing requirements. In August 1994, the Senate adopted a "Sense-of-the-Senate", sponsored by Senator Brown, that acknowledged state-passed environmental audit and self-evaluation privilege laws "as a low-cost opportunity to increase performance toward the intended effect of environmental protection statutes to improve and protect the natural and human environment."

In their role as "laboratories of democracy," as President Clinton likes to describe them, eighteen states have passed a version of the environmental audit legislation. As you may know, Colorado has enacted a statute that sets out incentives for regulated industries to perform self-audits and to disclose violations found in those evaluations. Specifically, the statute allows an evidentiary and testimonial privilege for self-audits that are followed by prompt correction of any environmental violations found. Further, the law allows immunity from certain civil and criminal penalties for violations reported and corrected.

Colorado's environmental privileges and immunities law is based on the assumption that business will respond positively to the incentives offered. In the long run, we expect that environmental compliance will improve because of the law. This is especially true for small businesses. For example, those small businesses that are newly covered by recent Clean Air Act amendments face a daunting choice. On the one hand, they may wish to comply with the law and undertake an audit to determine how their practices must be changed to reach compliance. On the other hand, they may perceive that it is a more logical business decision to blissfully ignore environmental responsibilities, hope that regulators will be too busy to notice their small enterprise, and come into compliance only when forced. They may fear that they are already violating environmental laws, but are afraid to discover the truth. The Colorado privileges and immunities law is designed to eliminate this dilemma for small businesses.

COLORADO'S EXPERIENCE

Colorado's privileges and immunities law has been successful in bringing companies together with out Department of Health to solve problems. Approximately fifteen companies have come forward to disclose violations of the environmental laws. These violations have ranged from permit exceedences to unpermitted discharges of pollution. Many of these violations would not have been discovered by enforcement personnel. More important, these are violations that have been or are being corrected.

One example is a firm that discovered, through an audit, that it was operating a boiler without the proper permits. The firm notified the Department of Health in October 1994 about the problem; the company filed the appropriate permit applications, and the whole matter was resolved by January 1995.

In another case, a company found that it was discharging acetone into a sanitary sewer. It disclosed this information and discontinued the practice.

In a recent case, a business found that its emissions of certain air pollutants exceeded permit limitations. The company met with the Department of Health and agreed to, and did, submit permit modification applications and install more efficient pollution control devices.

In other cases, companies, after disclosure of problems, have agreed to initiate additional training programs for their employees, to additional investigations of potential problems, and to discontinue practices causing environment damage.

These examples illustrate that privilege and immunities laws can result in better cooperation between industry and regulators, better internal reviews of environmental compliance, and, most importantly, a better environmental.

NEED FOR FEDERAL LEGISLATION

There are, however, two potential barriers to full and effective implementation of privileges and immunities laws. One barrier is the threat of a federal enforcement action in cases in which companies have disclosed violations to state authorities. The other threat is to state delegated programs.

Under Colorado's law, disclosures of violations to the state become public information. The practical effect of a disclosure to gain immunity under state law is the creation of a road map for federal enforcement. The company disclosing the discharge of pollutants into a sanitary sewer may be immune from penalties under state laws; but by disclosing it, it is handing EPA the evidence necessary to successfully prosecute it under federal law. In short, the lack of federal privilege and immunity provisions parallel to those of the states has the potential to effectively cancel out state laws.

Lest it be argued that federal enforcement is a hollow threat, there is ample evidence to indicate that EPA will overfile in states with privileges and immunities laws. The agency has consistently taken the position that it opposes privileges and immunities laws. It has sent letters to many of the states attempting to enact privileges and immunities laws opposing those efforts. Mr. Chairman, at this time, I would ask that a letter from EPA to Colorado's Governor Romer be entered into the record with my testimony.

More recently, in the EPA Voluntary Environmental Policing and Self-Disclosure Policy Statement, EPA states its firm opposition to statutory environmental audit privileges and to immunity provisions in most state laws. The agency clearly threatens overfiling with such laws when, in the interim policy at Section I.F., EPA states "it reserves its right to take necessary actions to protect public health or the environment by enforcing against violations of federal law." Even if it never overfiles in a specific case, EPA's threat alone will chill the implementation and use of state privileges and immunities laws.

Further, the EPA final policy is not an adequate substitute for federal legislation. While we applaud the agency's extensive efforts to gain public and state input into its policy, and its sincere efforts to enact a policy that provides incentives for self-evaluation, the policy is just that—a policy. In the end, it is a guidance document only which, by its own admission, "does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties." In short, the final policy provides no certainty that enforcement action will not be taken.

In addition to the uncertainty for business caused by the lack of federal privilege and immunity provisions, there is great uncertainty for state delegated and authorized programs. The EPA has made it clear that it will scrutinize delegated programs in states with privileges and immunities laws to determine whether those states have the necessary enforcement authorities to maintain those programs.

Recently, EPA has raised the issue of whether Colorado's privileges and immunities law will prevent the agency from approving the state's application to take over certain programs under the Clean Water Act. Specifically, EPA has imposed unnecessary hurdles to the approval for delegation of the federal facilities, pretreatment and biosolids programs to the state. Mr. Chairman, at this time I would ask that a letter from Kerrigan Clugh to Thomas Looby, dated March 5, 1996, be entered into the record with my testimony.

Of broader application, EPA headquarters has recently released a memorandum providing guidance to its regions in evaluating the effect of privilege/immunity laws on state air programs. The memorandum clearly suggests that such state laws may

take away the enforcement authority needed for states to carry out the Title V permit programs. Without going into great detail here, we believe the memorandum is written in such broad terms that it could potentially result in the withdrawing of Title V delegation in many states with privilege and immunities laws. Mr. Chairman, at this time I would ask that a memorandum from Steven Herman to Jackson Fox, dated April 5, 1996, be entered into the record with my testimony.

These express and implied threats by EPA to withdraw delegation under the Clean Water and Clean Air Acts have an additional chilling effect on the implementation of state privileges and immunities laws. Only legislation setting out a parallel federal privileges and immunities program can eliminate the uncertainty for businesses and states.

S. 582

We believe S. 582 is a good start at crafting a federal privileges and immunities law. We have some concerns about the impacts of the bill on state enforcement authorities. We would be happy to work with staff to resolve issues we might have with the legislative proposal.

CONCLUSION

As I noted previously, states have traditionally been the laboratories for democracy and the Union prospers when states are allowed to fully exercise this responsibility. Colorado views its audit privilege and disclosure law as an experiment, based on common sense, from which we can learn valuable lessons. The experiment ends on June 30, 1999. Colorado will obtain information during the five-year duration of this venture and determine whether it is beneficial to Colorado's people and environment. If so, we will continue the policy. If not, we will have learned a valuable lesson for ourselves and the other states in our Union. Whatever the eventual outcome, it makes sense for the federal government to allow this venture to continue. The states cannot perform our role as laboratories from which the states and the nation can learn, if we are not allowed to seek our own path.

Under current federal law, ignorance is rewarded while good faith compliance efforts create risks of punishment. Congress should enact a law like S. 582, which is designed to encourage small businesses to find out whether they are in compliance and to take compliance steps sooner rather than later. Significant compliance with our environmental laws cannot be achieved through utilization of traditional enforcement methods, such as command and control alone. We must establish programs that offer positive reinforcement to businesses if we are to make any gains in environmental compliance. It is time that environmental laws passed in the 1970s are made workable for the realities of the 21st Century.

U.S. Environmental Protection Agency,
Denver, CO, April 29, 1994.

Hon. Roy Romer,
Governor of Colorado, State Capitol, Denver, CO.

Dear Governor Romer: I am writing to express the U.S. Environmental Protection Agency's serious concerns regarding proposed Colorado legislation that would create an evidentiary privilege for "voluntary self-evaluations" of compliance with environmental laws and penalty immunity for voluntary disclosures of violations that such evaluations reveal. We believe that the proposed legislation places unwarranted rigidity on the exercise of enforcement discretion. Indeed, we believe that Colorado's environmental enforcement program would be significantly weaker than the federal scheme if this legislation is enacted.

I must first emphasize that the Agency is committed to environmental auditing and strongly encourages the regulated community to invest in auditing as a sound business practice. Fortunately, there is every indication that environmental auditing is on the rise in the regulated community—not only because it makes good business sense as a means of helping regulated entities manage pollution control affirmatively over time, instead of reacting to crises, but also because it increasingly is required by lending institutions and insurance underwriters.

EPA is also aware of the wisdom of according environmental audits some measure of privacy. We believe that EPA's current policy of environmental auditing strikes the appropriate balance between respect for the confidential nature of environmental audits and the need for enforcement authorities to retain enforcement discretion. EPA's July 1986 policy statement on environmental auditing states that "as a matter of policy, EPA will not routinely request environmental audit reports." Instead, the Agency will ordinarily request audit report information only in limited

cases where "the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation." Requests are likely to be made only for specific portions of an audit report, as opposed to the entire report, and only where the information cannot be obtained from monitoring, reporting or other means. For example, EPA might request audit information where auditing is required under a settlement, a facility has raised its management practices as a defense, or a defendant's state of mind is at issue (as in a criminal case). Every example cited by those who have suggested that EPA routinely ignores this policy has turned out to be a case in which an audit privilege such as Colorado is considering would not apply.

With respect to state enforcement programs, EPA's policy encourages states to adopt policies similar to EPA's, but admonishes that "[r]egulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems." The proposed Colorado legislation raises serious concerns in this regard. First, the evidentiary privilege portion of the bill creates numerous definitional issues that are likely to be vigorously contested—even in cases where an audit privilege or immunity does not apply. The resulting delays or derailments of enforcement actions will seriously impair Colorado's environmental programs. Of even greater concern, however, is the penalty immunity that the proposed legislation would establish for certain voluntary disclosures of violations. In effect, the statute creates an absolute defense for entities that conduct audits and take timely action to correct violations, allowing violators to reap all of the economic benefit of even the most serious violations. Although we recognize the value in accounting for auditing in determining appropriate penalties, Colorado's proposed immunity amounts to a significant departure from and weakening of the federal enforcement scheme. As a result, we anticipate a significant increase in the number of actions in which EPA "overfiles" a state enforcement action. More critically, the immunity provision in the proposed bill seriously jeopardizes EPA approval of program delegations, such as the Title V permit program under the Clean Air Act. EPA regulations implementing Title V require states to have authority to recover civil penalties in a maximum amount of not less than $10,000 per day per violation. In addition, states must have the authority to impose criminal fines.

As EPA implements the reorganization of its headquarters enforcement program, we will continue to work with industry and other interested groups in developing innovative ways to promote compliance by encouraging environmental audits. Our new Office of Compliance will be particularly well-suited to tailoring compliance assistance and promotion to the specific community. This will include examining whether and where empirical information indicates a need for further EPA and state efforts to allay fears regarding the use of audit information in enforcement actions.

I strongly urge Colorado not to constrain legislatively an area that is better left to the measured development of executive policy regarding the exercise of prosecutorial discretion. I appreciate your consideration of EPA's views on this important enforcement issue and I look forward to continuing to work with the State of Colorado on effective ways to use enforcement tools to promote environmental compliance.

Sincerely,

JACK W. MCGRAW,
Acting Regional Administrator.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Washington, DC, April 5, 1995.

Subject: Effect of Audit Immunity Privilege Laws on State Requirements.
From: Steven A. Herman, Assistant Administrator, OECA; Mary Nichols, Assistant Administrator, OAR.
To: Jackson Fox, Regional Counsel, Region X.

I. INTRODUCTION

A. Title V requires States to have adequate enforcement authority

This memorandum responds to your request for guidance as to whether certain provisions of state audit immunity and privilege laws deprive the state of adequate authority to enforce the requirements of Title V of the Clean Air Act. The Clean Air Act (CAA), in Section 502(d), authorizes State to implement operating permit programs pursuant to Title V of that law. Before a State's program can be approved, however, the Environmental Protection Agency (EPA) must determine that the

State's permit program meets the minimum standards established under the law. In particular, Section 502(b)(5) of the CAA requires states to have authority to enforce the terms and conditions of Title V permits. These requirements protect citizens from criminal conduct and violations that threaten public health and the environment. They also ensure citizens of the fair application of federal laws, regardless of whether they are administered by EPA or State agencies.

This memorandum offers guidelines to assist the Region in determining whether specific provisions of State audit privilege or immunity laws would in fact deprive the State of federally required authority to enforce the Title V permits. Because State laws differ in important details, Regions should review laws of pending bills closely in applying these guidelines, and consult with both States and headquarters before making a determination. Where a State privilege or immunity law deprives the state of adequate enforcement authority, as explained in these guidelines, it must be amended before final Title V approval can be granted. These guidelines are limited to enforcement authorities required for Title V approval, and do not address other substantive program requirements.

Recently, State legislators, state officials, and various environmental groups have questioned whether proposed immunity and privilege bills would jeopardize a State's ability to enforce federally delegated programs, including those administered under the Clean Water and Resource Conservation and Recovery Acts. While these studies include requirements similar to those of the Clean Air Act concerning adequate authority, they may also impose additional requirements not contemplated under Title V of the Clean Air Act. For that reason, these guidelines are limited to Title V, and the Office of Enforcement and Compliance Assurance (OECA) will work with the Regions to prepare supplementary guidance to address enforcement requirements of other statutes.

B. EPA support for auditing

EPA supports incentives which encourage responsible companies to audit to prevent noncompliance, and to disclose and correct any violations that do occur. Through its own policy issued on December 18, 1995,[1] EPA has agreed to reduce civil penalties and not recommend criminal prosecution for certain types of violations discovered and corrected through voluntary self-policing. That policy was developed through an open process that included extensive consultation with States, leading 16 State attorneys general to conclude:

The consultative process used in developing the policy provides an excellent example of how EPA and the states work in harmony to encourage both voluntary compliance and effective law enforcement.[2]

At the same time, EPA has consistently opposed blanket amnesties which excuse repeated noncompliance, criminal conduct, or violations that result in serious harm or risk, as well as audit privileges that shield evidence of violations from regulators and jeopardize the public's right-to-know about noncompliance.

C. Consultation with States

This document offers general guidelines to assist in the review of State audit privilege and immunity legislation. It should be noted that these State laws differ in important details: while some will affect a State's ability to enforce provisions of Title V permits, others will not. Using the guidelines laid out in this memorandum, the Agency will need to evaluate the impact of individual State statutes on Title V enforcement on a case-by-case basis. EPA believes that minimum statutory enforcement standards for federal programs will not discourage innovation or jeopardize the strong working partnership the Agency is developing with States. The Agency will make every effort to work cooperatively with States to resolve any problems that may arise due to conflict between federal and State law.

D. Principles

The following principles should guide EPA's analysis of State audit privilege and/or immunity legislation with respect to Clean Air Act Title V program approval: EPA's review should be focused upon those few provisions that conflict with specific federal requirements for adequate enforcement authority. Some provisions in State laws may be ambiguous. EPA may accept reasonable opinions from the State Attorney General which interpret the statute as providing the State with the required authority. EPA will consult closely with States, and provide them with ample opportunity to correct specific problems. Pursuant to Clean Air Act Section 502(g), EPA

[1] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Federal Register 246 (December 22, 1995), pages 66706–66712.

[2] Letter to EPA Administrator Carol M. Browner, dated January 26, 1996. In total, the signatories included 19 state officials.

has and will generally continue to grant interim approval to States with audit legislation, but will identify whether specific provisions must be changed before final approval can be granted.

II. SPECIFIC ENFORCEMENT AUTHORITIES REQUIRED FOR TITLE V DELEGATION

A. Emergency orders/injunctive relief

Emergency Orders: The State must have authority to bring suit to restrain responsible persons where a pollution source or sources is presenting an "imminent and substantial endangerment" to the public health or welfare or the environment. The Clean Air Act, at Section 110(a)(2)(G), requires such authority for state implementation plans, the provisions of which must be incorporated into Title V permits. The Title V regulations, at 40 C.F.R. 70.11(a)(1) also expressly require States to have the authority to seek emergency orders. This authority should be clear, and not constrained by express or implied limitations in State immunity laws.

Injunctive Relief: The State must have clear authority to seek injunctive relief where needed to stop a violation, correct noncompliance, and prevent its recurrence. Injunctive authority is essential to the State's ability to assure compliance and enforce permits under Section 502 of the Clear Air Act. The Title V regulations, at 40 C.F.R. Section 70.11(a)(2), explicitly require States to have such authority, which should be clear and unfettered by either express or implied limitations in State immunity laws.

B. Criminal enforcement authority

Knowing Criminal Conduct: Section 502 of the Clean Air Act requires states to have authority to recover "appropriate" penalties for criminal conduct, which in the Title V regulations (40 C.F.R. Section 70.11(a)(3)(ii)) includes "knowing" criminal conduct. Any legislation that immunizes willful, intentional, or knowing criminal conduct conflicts with this requirement, and must be amended before final Title V approval may be granted.[3]

Burden of Proof: The title V regulations, at 40 C.F.R. Section 70.11(b), prohibit the burden of proof and degree of knowledge or intent required under State law for establishing civil or criminal liability to be greater than is required under federal law. State immunity laws that, for example, require a showing of specific intent or harm to the environment to establish criminal liability, are inconsistent with this requirement and must be amended before final Title V approval can be granted.

C. Civil penalty authority

Section 502 of the Clean Air Act requires States to have authority to recover civil penalties of at least $10,000 per day for violations of Title V permit conditions (see also 40 C.F.R. 70.11). States must exercise that authority by collecting penalties appropriate to the violation.

Section 113(e) of the Clean Air Act, which addresses "Penalty assessment criteria," mandates that the Administrator or the court "shall take into consideration" certain factors in assessing penalties. To the extent that state laws provide an immunity from civil penalties that does not permit any consideration of these factors, appropriate civil penalties cannot be assessed; and a State's Title V permit program should not be approved. Factors that must be considered in determining an appropriate penalty pursuant to Section 113(e) of the Clean Air Act include: "the violator's full compliance history and good faith efforts to comply, the duration of the violation * * *, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.".

Thus, a State Title V program should not be approved if State law provides immunity from civil penalties for repeat violations, violations of previous court or administrative orders, violations resulting in serious harm or risk of harm, or violations resulting in substantial economic benefit to the violator.[4] These considerations are also reflected in EPA's policy on Incentives for Self-Policing. EPA should approve

---

[3] The Clean Water Act regulations require states to have the authority to seek penalties for "gross negligence".

[4] The Agency recognizes that there may be different ways to calculate any economic gain that may have occurred from a violation, and that the use of any specific model or assumptions is not required.

state programs which include conditions substantially equivalent to those reflected in the Clean Air Act and regulations, and adopted in EPA's policies.[5]

D. Privilege

The regulations governing program approval do not specifically address the scope of privileges available in State enforcement actions. Minor variations among States with regard to generally available privileges (*e.g.*, attorney-client communication) would not affect program approval. However, where a State adopts a very broad privilege law, specifically directed at evidence related to environmental violations, that privilege could go so far as to render the overall State enforcement program inadequate even if other authorities (*e.g.*, injunctive relief and penalties) were nominally available. An excessively broad privilege could so interfere with the exercise of these authorities as to render them largely meaningless by depriving the State of the ability to gather evidence needed to establish a violation.

The point at which a privilege law goes too far is difficult to define in general terms, and such laws will have to be evaluated on a case-by-case basis. However, certain types of provisions are particularly likely to raise this concern and will generally lead to a finding that the enforcement program is inadequate.

Information Required by Law, Regulation, or Permit: In order to assure compliance effectively, as required by Section 502(b)(5)(A) of the Clean Air Act, the State must have access to evidence to determine whether violations have, in fact, been corrected. At a minimum, State law must not limit an Agency's access to information that federal or state laws or regulations require to be collected, maintained, reported, or otherwise made available. These include, for example, compliance plans, emissions or monitoring reports, and compliance certification under Title V, which are also required to be publicly available.

State Access Needed to Verify Compliance: Where an audit produces evidence of noncompliance, but State law prevents the enforcing agency from reviewing that evidence to determine whether the violation will be corrected, the State is unable to assure compliance. Such provisions must be addressed prior to any final Title V approval.

Audit Presents Evidence of Criminal Conduct: Similarly, where an audit reveals evidence of prior criminal conduct on the part of managers or employees, but the State is barred from using such information, the State lacks the ability to obtain appropriate criminal penalties as required by Section 502(b)(5)(E) of the Clean Air Act.

Sanctions for Disclosure of Privileged Information: Another area of concern is laws that impose special sanctions upon persons who disclose privileged information. Courts have effectively exercised control over such disclosures in other areas protected by privileges (such as the attorney-client and doctor-patient privileges) through inherent powers to exclude evidence and other general sanctions. Special sanctions in this area are unwarranted and, especially where the potential for liability is broad and the privilege is not clearly defined, would have a chilling effect upon disclosures well beyond the intended reach of the privilege. Confidential informants are a critical source of leads for EPA's criminal enforcement program, as they are for enforcement programs throughout Federal and State governments. Indeed, the Clean Air Act specifically protects "whistle blowers" from retaliation (Section 322) and also provides awards for persons who furnish information that leads to a criminal conviction or a civil penalty (Section 113(f)). Therefore, provisions that penalize those who disclose information related to a possible violation of the Clean Air Act may be inconsistent with an adequate enforcement program.

This list is not intended to be exhaustive, and other factors may also cause a privilege law to be excessively broad. For example, laws that define the term "audit" loosely may shield so much information as to significantly impede enforcement efforts, or may lead to very broad assertions of privilege that consume inordinate time and resources to resolve.

---

[5] EPA's policies include the afore-mentioned policy on Incentives for Self-Policing, the interim policy on Compliance Incentives for Small Businesses, and the policy on Flexible State Enforcement Responses to Small Community Violations.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Denver, CO, March 5, 1996.

Re comments on draft response to self-audit law questions.

THOMAS LOOBY,
Director, Office of Environment, Colorado Department of Public Health and Environment, Denver, CO.

DEAR MR. LOOBY: As you are aware, we are continuing to work together to assure that your CPDES program modification application fully addresses the required and recommended actions provided in the July 12, 1995 letter from Steve A. Burkett, P.E., Chief NPDES Branch, Water Management Division, EPA Region VIII, to Robert Shukle, Chief, Permits and Enforcement Section, Water Quality Division, Colorado Department of Health regarding SB 94–139, the Environmental Self-Audit Bill, enacted in June 1994. The date for EPA's final determination of completeness has been extended several times for us both to address these actions. The current deadline is March 6, 1996, which is twenty-five (25) Federal workdays following the last deadline of January 30, 1996.

On January 9, 1996, we received a telefax of your draft letter responding to our request for more information. On January 17, 1996, we received a telefax of the draft letter to you from Martha Rudolph, Colorado Office of the Attorney General. This letter, which you intend to attach to your formal response, addresses the impact of SB 94–139 and federal delegation of the NPDES program (including pretreatment, sludge management, and federal facilities) to Colorado. Enclosed are our Agency comments regarding your draft letter and the draft letter from Ms. Rudolph.

Please provide your formal response with signed legal opinion from the Office of the State Attorney General by March 25, 1996. Upon receipt of your response we will make our determination of completeness. The ninety-day review and approval period referred to in 40 CFR 123.61 will be calculated from the date we receive your response. If we do not receive a formal response by March 25, 1996, we will assume you have decided not to provide an official response to our request for more information concerning SB 94–139 and will return your application with a determination that it is incomplete, or we can arrange another extension at your request.

If you have any questions or comments, please contact me at 312–6928 or Janet LaCombe, of my staff, at 312–6287. Thank you for your attention to this matter.

Sincerely,

KERRIGAN G. CLOUGH,
Assistant Regional Administrator,
Office of Pollution Prevention, State, and Tribal Assistance.

COMMENTS REGARDING THE DRAFT LETTERS ADDRESSING SENATE BILL 94–139

COMMENTS REGARDING THE ATTACHMENT TO THE DRAFT LETTER FROM THOMAS LOOBY (PROPOSED WORDING FOR MOA)

1. EPA agrees to the proposed wording, with some changes, as noted below:

EPA and CDPHE recognize that they are partners in [Federal] environmental enforcement and that it is desirable to create a climate in which Colorado can be innovative, while maintaining an enforcement program which meets the requirements for State-authorized NPDES programs. Likewise, both agencies place a high value upon compliance promotion as a useful alternative to enforcement in some instances. [It is agreed that] Voluntary evaluations, [evidentiary privileges,] and penalty reductions [or limited immunity] may be useful tools in some cases to achieve higher compliance rates and environmental benefit.

[At the same time,] EPA is required to establish a certain minimum consistency in federal enforcement, so that sanctions a business faces for violating federal law do not depend on where the business is located. Colorado has enacted a state law providing an evidentiary privilege and statutory immunity from fines and penalties in certain instances. The state agency believes that EPA should assume a posture of letting the state environmental law have a chance to work and demonstrate its environmental benefits.

In accordance with the national agreement between EPA Headquarters and the Environmental Council of the States, each state and region is free to proceed to develop oversight paradigms in the context of their Environmental Performance Partnership Agreements.

Accordingly, to maintain national consistency, EPA is free to provide the type of oversight developed through the EPA process which may include year-end pro-

grammatic reviews on one end of the spectrum and, on the other, scrutiny of enforcement more closely in a state where environmental self-audit privileges or penalty immunities may exist. As Colorado has such provisions, increased scrutiny [may] will apply to enforcement actions where the State's privilege or immunity provisions are being employed under the Colorado Discharge Permit System program, general permit program, federal facilities program, pretreatment program, and biosolids program. EPA may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent the State from obtaining: 1. information needed to establish criminal liability; 2. facts needed to establish the nature and extent of a violation; 3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit; 4. appropriate sanctions or penalties for criminal conduct and repeat violations; and 5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.

[The Water Quality Control Division will enforce the Colorado Water Quality Control Act in lieu of EPA enforcement of the Clean Water Act, except maybe as limited herein. The CDPHE Water Quality Control Division will, likewise, implement the state provisions pertaining to evidentiary privilege and statutory immunity as adopted by the Colorado General Assembly.]

2. In the enclosure to its July 12, 1995 letter, EPA indicated that the MOA should contain a reporting requirement regarding the names of facilities conducting self audits. The requirement is set forth below. In subsequent letters, EPA referred to that requirement. EPA considers this to be a required item in the MOA, because of its importance in demonstrating how Colorado is implementing its self-audit legislation.

Please add an item 15 to Section VI, "Reporting and Transmittal of Information", as follows: 15. A list of facilities which have notified the State that they will conduct, are conducting, or have conducted environmental self-evaluation within five (5) days of notification.

If providing names of facilities is not acceptable to Colorado, EPA requests that the Attorney General letter discuss what information relating to its implementation of the audit legislation that Colorado could provide EPA and under what conditions the information could be provided. EPA requests that the MOA, item 15 of Section VI define the information which would be provided and frequency of reporting. Examples of such information may include: how many self-audit reports and disclosures were provided to the Department; how many of these were determined to be covered by SB 94–139; how many of these, if any, were reviewed in camera by any judge and what the results of the in camera review were; what types of violations were found; how many compliance schedules were developed; what time periods and other requirements were included in the compliance schedules developed to address disclosed violations; whether any criminal penalties were waived and, if so, what violations were involved; and copies of any written guidance to technical staff defining the process to be used for determining whether self-audit reports and disclosures are covered by SB 94–139.

COMMENTS REGARDING THE LETTER FROM THE OFFICE OF THE STATE ATTORNEY GENERAL

1. *Exemptions to Statutory Privileges and Immunity.* On January 17, 1996, Colorado provided EPA with a draft letter, dated August 1, 1995, from Martha Rudolph, Assistant Attorney General. This letter stated, in part: SB 94–139 will have only marginal impact on Colorado's Water Quality program. the self-evaluation privilege created in section 1 of SB 94–139 does not apply to any information required to be available, reported, or furnished under any law, including the Clean Water Act and the Colorado Water Quality [Control] Act, and associated regulations. The Division will still have access to such information consistent with the requirements of the CWA and the [CWQCA].

The draft letter also stated, on page 6, that "the Division may not be able to assess civil or criminal penalties for some violations of the [Colorado Water Quality Control Act]. * * *"

EPA requests that the Colorado Attorney General's Statement address what civil or criminal violations, if any, of any regulation, any order issued by the Division, any NPDES permit condition, any NPDES filing requirement, or any duty to allow or carry out inspection, entry, or monitoring, would be covered by the audit privilege, the witness privilege, or the presumption against penalties.

As discussed below and in Ms. Rudolph's draft letter, it appears that many violations are not covered by the audit privilege, the witness privilege or the presump-

tion against penalties. It is not clear what violations, if any, could be exempt from enforcement actions by virtue of SB 94–139.

For example, no violation of any discharge permit would appear to be covered by the audit privilege. Section 6.9.4(16) (5 CCR 1002–2) provides: Permits shall require that the permittee report all instances of noncompliance at least annually.

Given the requirement for the permittee to report all instances of noncompliance at least annually, it would appear that any permit violation (and, at least arguably, any violation by a permittee of any control regulation or other requirement) would fall within the exception provided by C.R.S. Section 13–25–126.5(4)(a). This provision exempts "documents or information required to be developed, maintained, or reported pursuant to any environmental law or any other law or regulation" from the self-evaluation privilege.

Another example of a violation that may not be covered by the audit privilege is discharging without a permit. This is not in itself a permit violation. However, any person who discharges into waters of the state is required by Section 6.5.1 (5 CCR 1002–2) to submit an application to the Division at least one hundred eighty days prior to the discharge. Therefore, any person discharging without a permit would have been under an obligation one hundred eighty days before the discharge to notify the Division. This would appear to bring the violation within the exception to the audit privilege provided by C.R.S. Section 13–25–126.5(4)(a).

It is less clear whether an unpermitted discharge would be covered by the presumption against penalties. Section 6.5.1 (5 CCR 1002–2) Sec. 25–1–114.5(3) provides that any disclosure required under a specific permit condition or an order would not be a "voluntary disclosure" for purposes of the presumption against penalties. If no specific permit condition or order requires a discharger to disclose an unpermitted discharge, then disclosure of an unpermitted discharge would possibly be "voluntary" and not subject to penalties.

EPA requests that the Attorney General's opinion clarify: What, if any, any discharge permit violations are not required by Colorado law to be reported to the Division; whether the requirement of Section 6.9.4(16) to "report all instances of noncompliance at least annually" covers a permittee's violation of any CDPES regulation, order, or other requirement regardless of whether that requirement is found in the permit; whether there is any circumstance in which the violation of discharging without a permit would not be required to be reported to the Division, and therefore has the potential to be subject to the audit privilege or the witness privilege; whether there is any circumstance in which the disclosure of an unpermitted discharge would be considered a "voluntary disclosure" subject to the presumption against penalties; whether any violation of any pretreatment standard or requirement, including the regulations at 4.3.0 (5 CCR 1002–20), would be subject to the audit privilege, the witness privilege, or the presumption against penalties; whether any violation of any sludge regulation at 4.9.0 (5 CCR 1002–19), would be subject to the audit privilege, the witness privilege, or the presumption against penalties; and whether the exemptions to the audit privilege in C.R.S. § 13–25–126.5(4) are sufficiently broad so that Colorado has adequate authority "[t]o inspect, monitor, enter, and require reports to at least the same extent as required in Section 1318 [Section 308 of the Clean Water Act]." Authorized state NPDES programs are required to have this authority according to Section 402(b) of the Clean Water Act, 33 U.S.C. Section 1342(b).

2. Injunctive Relief. One of the conditions for the presumption of immunity from penalties in C.R.S. § 25–1–114.5 is that the violator correct the noncompliance within two years. This condition raises some question as to whether Colorado can pursue injunctive relief during this two-year period. EPA requests that the Attorney General's Statement clarify whether the State has authority to pursue injunctive relief during this two-year period. (Note: The December 18, 1995 draft letter from Thomas Looby stated that the rebuttable presumption of statutory immunity applies only to monetary fines and penalties and that "the full range of other enforcement options remains available," but it did not specifically address this two-year period.)

3. Burden of Proof. The August 1, 1995, draft letter from Ms. Ruduloph stated, "Burden of proof is only addressed by SB 94–139 in the context of disproving the existence of a privilege, or rebutting the presumption that a disclosure of a violation, made to obtain immunity from the assessment of penalties, was voluntary."

However, EPA remains concerned that when the only way to prove a violation is through a self-audit, Colorado must disprove the existence of a privilege in order to prove the existence of a violation. Similarly, if the only way to prove a violation is through a disclosure by the violator, Colorado could not obtain any penalty unless it could rebut the presumption that a disclosure was voluntary. These steps are not

required to prove a violation or to obtain penalties[1] under the Clean Water Act. Therefore, it would appear that Colorado law requires a greater burden of proof than allowed by 40 C.F.R. Section 123.27(b)(2). EPA requests that the Attorney General's statement clarify this issue.

Senator BROWN. Thank you all. It has been a most helpful panel. I did have a few questions, and I know we are on a press for time, but, Ms. Bangert, maybe you would help me with one aspect of your testimony. You mentioned that Colorado's law provides for immunity from some penalties for those folks who both report and correct the violation. Can you give us a framework of what areas the immunity applies to and what areas it does not?

Ms. BANGERT. The immunity would apply to the situation where there is a violation that was discovered in an audit and it was disclosed and it was corrected. What the immunity grants is immunity from fines and penalties for civil cases, administrative cases, and criminal cases where there is negligence involved, not where there is some knowing violation or willful violation.

Senator BROWN. Somewhat similar to what was described for Texas?

Ms. BANGERT. Yes, yes, but also I think an important point to make about the disclosure immunity is that it is immunity from fines and penalties. It does not in any way interfere with the health department's ability to issue cease and desist orders or compliance orders or go in for injunctions to protect the environment or to stop some bad action.

It also does not apply to disclosures that are required to be made under permits or orders. Therefore, Ms. Coleman's example of the bad spill that might be covered up by an audit in Colorado, No. 1, because that is a disclosure that is required to be made; No. 2, because it didn't result from an audit. In addition, we have safeguards against bad actors utilizing the disclosure immunity provisions.

Senator BROWN. As we attempt to do in the draft here.

Mr. Johnson, you were very helpful in your testimony. I wanted to ask you, other than information submitted in a voluntary audit that could have probative value in terms of court proceedings, criminal proceedings, do you see this proposed statute as barring any other evidence in a criminal proceeding?

Mr. JOHNSON. Well, Senator, I think that that is what is troubling to prosecutors generally, is that when you seek to create a privilege and immunity provision that understandably is trying to draw a balance between the good actor and the bad actor, the difficulty is trying to do that in a way that is not going to be abused by—as I say in my comments, the imagination of criminal defense attorneys never ceases to amaze me, and I think what concerns us is the mischief that this can create if used in a proactive sense from a corporate standpoint.

I couldn't give you what examples I think might happen because, to be honest with you, it is very difficult. I can imagine companies—I am not talking about the responsible ones, but the irresponsible ones who are able to use the privilege, much like drug dealers

[1] Under EPA's self-audit policy, if a violation were voluntarily disclosed, EPA would not seek the gravity component of a penalty, but it would be able to recover the economic benefit component.

today, we find, keep attorneys basically on retainer to take full advantage of the attorney-client privilege and thwart frequently ongoing, long-term investigations to utilize that privilege. That is a privilege that we have all agreed to and is part of our law. I am just saying that to create yet another one in the area of criminal prosecution raises a whole number of issues that it will take years for the courts to resolve.

Senator BROWN. I am not doing too well, I guess, phrasing questions. Let me try again. The drafters of this statute tried to draft it so that anything that was admissible on its own could be admitted in terms of prosecution.

Mr. JOHNSON. Correct.

Senator BROWN. Have we missed anything that is admissible on its own without the audit in terms of making it clear it is admissible?

Mr. JOHNSON. I mean, I think as far as the reports that have to be made otherwise, are those the things you are referring to?

Senator BROWN. Well, if I understood what you were getting at—and I may not have so you may want to correct me, but if I understood what you were getting at, you are concerned this could lead to some game-playing where someone would voluntarily report something and then somehow think that gave them protection from that fact being proven in court even though it might be available from another source.

Mr. JOHNSON. Well, yes, that is one issue, but also, frequently, if things come to our attention, the other issue is was this known beforehand. You know, what steps had the company taken before? Had they voluntarily complied for years and then decided it was simply too expensive? Is that kind of information available in their records that would otherwise typically be discoverable either through search warrant or subpoena, grand jury, whatever, that might be protected down the road if they claimed that it fell under a self-audit privilege?

Senator BROWN. I might say I think the interests of the folks drafting this were to make it crystal clear that anything that was admissible now to prove a criminal case would continue to be admissible, and they tried to draft very broad language to do that, except for something comparable to a self-confession. If, as you review the language, you find a better way of saying it or way to make it clear, we would appreciate that because I think that is the intent here to make it clear that there is no evidence lost that would be available.

I want you, if you can, for a moment just to switch sides. Prosecutors have been known to do that in their career. Let us say you are a defense counsel and the defendant says, I want to go to the prosecutor and tell him everything I know even though it is against my interest. What would your advice be to them?

Mr. JOHNSON. Well, I would have to know a lot about the case, but, honestly, in this situation if a company—switching sides back to my role which I am far more familiar with as a prosecutor, if——

Senator BROWN. I don't want to take you out of your expertise, but I have a feeling you have some good knowledge on both sides.

Mr. JOHNSON. I did spend time as a defense attorney, and frankly going to the prosecutor, if you are being honest, is a very valuable defense tool. If you are not being honest, it can be a real problem. But what I am suggesting is, from a prosecutor's standpoint, if a company were to come in and say, we discovered this—now, I am talking about criminal—I am not talking about regulations, civil lawsuits or anything like that. But if they came in and said, we discovered this on our own, we are bringing it to your attention and this is the action we have taken to rectify it, that is not a terribly attractive case from a criminal prosecution standpoint if there is nothing else.

In other words, if they don't have a history of this type of behavior and you can't show that it was somehow a subterfuge or was a fraudulent effort to avoid prosecution—I mean, if they are, in good faith, coming forward, it would be an unusual prosecutor, to say the least, that would find that to be an attractive case to prosecute criminally. Now, again, I am not talking about what other aspects there may be of that disclosure, but that is not a case that prosecutors typically would jump at the chance of taking to a jury or anywhere else.

Senator BROWN. I think that is a good observation. Do you think the existence of this law would result in areas of pollution coming to light that wouldn't come to light without it? Will we know more about violations and will we have more of them cleaned up if you have this law than if you don't?

Mr. JOHNSON. Well, I think what it is safe to say is—all I am saying is that there are certainly some arguments that can be made. Now, frankly, I think the EPA policy is something that is well worth looking at and seeing how that works over time and whether that encourages additional responses.

I guess my point is if you simply carve out for the purposes of this statute criminal—just leave criminal off to the side, I think you are—criminal is a very small fraction. We are not here to say that—where the rubber meets the road in these issues is dealing with whether civil litigation or regulatory action. The criminal is always very rare.

Senator BROWN. Normally, the most egregious.

Mr. JOHNSON. It is a utilization of resources. What you are looking for is what causes the greatest damage and where that person looks to be the most outrageous in their activity. Those are the people that you want—and I say people meaning either individuals or corporations—those are the people that are deserving of criminal sanctions and those are the people that we feel that not only would the Senate want prosecuted, the people want prosecuted and prosecutors want prosecuted. All we are concerned about is something that would, in essence, cause some potential problems in restricting our ability to do just that in the deserving case.

Senator BROWN. Thank you. Mr. Riley, does the Texas law result in more of these pollution instances coming to attention and being corrected than would be without the law, in your view?

Mr. RILEY. In my view, it does, primarily in the area of what is entailed during a routine compliance inspection. Obviously, we are limited in our resource application, as everyone else is. We are not capable in most instances of performing a comprehensive review

that covers time spans ranging in 10 years in some of the audits that we have seen already. So, certainly, to that extent, it illuminates or brings forward violations that might otherwise have gone undetected by traditional enforcement inspection.

We are experiencing those benefits presently. We have seen in the instances that have come to light under our disclosure law that companies have detected violations that we would not have detected through our own efforts. So the answer simply is yes.

Senator BROWN. Obviously, concerns have been raised by some that some serious violations would be barred from prosecution, or strong civil action may be precluded by the existence of these kinds of statutes. Has that happened in Texas?

Mr. RILEY. Enforcement action is not precluded at all. What may be precluded is imposing a punitive sanction, either a penalty amount or a criminal sanction. But there is no immunity under Texas law from enforcement; that is to say that we may still proceed through the enforcement process in a self-disclosed violation to an injunctive order. So we are not eliminating enforcement authority or giving complete relief from enforcement authority. We are simply eliminating the punitive sanctions and the penalties.

Senator BROWN. What about criminal prosecutions? Have they been inhibited?

Mr. RILEY. Not in my experience. Part of my division is a criminal investigative unit called the Special Investigations Unit. The assistant director of that unit chairs a multiagency State-Federal criminal investigative task force, and to date we have not experienced any instance where this privilege has been asserted. We have experienced instances where the attorney-client privilege has been asserted, and I recall one where essentially a room full of documents, floor to ceiling, was asserted to be protected by attorney-client privilege.

Senator BROWN. Ms. Bangert, your thoughts on Colorado. Has the Colorado statute resulted in the disclosure and correction of more environmental problems or not made a difference in that area?

Ms. BANGERT. Well, there have been 15 companies and maybe 20 violations that have been disclosed and then corrected, and one would have to assume that at least some of those would never have been found independently. Therefore, having even one violation corrected is a positive gain for the environment.

Senator BROWN. I appreciate the panel's testimony. It has been very helpful, and I hope as you all think about this, if you have suggestions for us as you pore through this, we would very much appreciate hearing from you. Thank you.

We will ask the fourth panel to come forward. Senator Don Ament from Sterling, CO, is with the American Legislative Exchange Council. Mr. Jerry Richartz is the Corporate Manager of Environment and Energy at the Oregon Steel Mills, and Mark Woodall is Chair of the Audit Privilege Task Force of the Sierra Club.

Mark, we have heard a lot today about privileges. Apparently, that is your specialty. Will you start us off?

PANEL CONSISTING OF MARK WOODALL, CHAIR, AUDIT PRIVILEGE TASK FORCE, SIERRA CLUB, WOODLAND, GA; JERRY O. RICHARTZ, CORPORATE MANAGER FOR ENERGY AND ENVIRONMENT, OREGON STEEL MILLS, INC., PORTLAND, OR, ON BEHALF OF THE STEEL MANUFACTURERS OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS; AND DON AMENT, COLORADO STATE SENATOR, DENVER, CO, ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL

STATEMENT OF MARK WOODALL

Mr. WOODALL. I would be glad to. Thank you, Mr. Chairman. My name is Mark Woodall and I am the Legislative Chair for our Georgia Chapter, as well as the Chair of the Audit Privilege Task Force. I do thank you for the opportunity to appear here today on behalf of our 550,000 members of the Sierra Club.

We as the Sierra Club are very opposed to the creation of any new privileges or immunities, and therefore we strongly oppose S. 582 as it is written. I think it is very edifying as we have followed this legislation around the country to take a look at some of the names that have been given to this bill. In Georgia and Florida, it was known as the Right to Poison People and Property and Keep it Secret, the Pollution Secrecy Act, the Find It and Hide It Bill, the Polluter Relief Act. In Arizona, it was dubbed the Bhopal Bill and the Dirty Secrets Act. I could go on with the names. I think really it should be called the Obstruction of Justice Act.

Senator BROWN. It sounds to me like you may not favor this. [Laughter.]

Mr. WOODALL. Yes, sir, we are opposed to it.

As you have heard today, this bill has been adopted in some form by 17 or 18 States, but I would point out to you that this year the bill has been rejected in 12, and I think as of midnight last night in Alabama, 13 States have rejected this legislation, and for very good reasons.

The No. 1 reason we have to be so opposed to this bill is the fear that this will create a vast new dumping ground for any sort of corporate secrets. As we have had touched on by the EPA and the district attorneys, privilege is a very rare thing under our judicial system. I pulled out the Georgia Code, 24–921. In Georgia, the only admissions and communications which are privileged are communications between husband and wife, attorney and client, among grand jurors, secrets of state, and psychiatrist and patient.

As you have heard described by the district attorneys, they feel, and the Supreme Court has pointed out, privileges are in derogation of the search for truth, which is the very basis of our judicial system. That is why we fear this legislation.

As you alluded to, Colorado passed this bill back in 1994 with privilege and immunity, and I have the front page of the Denver paper from last month—"Polluters Get Off Scott Free," which discussed the 16 instances where the bill had been used. This only touched on the voluntary disclosure part of the bill. I believe that this article misses the point. We have no idea whether it is 100 or 1,000 or 10,000 people that have used the privilege part of the law to sweep anything they want to under the rug, so to speak, and the

only way this is going to show up is when privileged pollution starts killing somebody. We find this to be unacceptable. This sort of pollution—you know, when property is damaged, people should be able to recover. This sort of a bill would make it impossible for third parties who are damaged to recover.

Third, the Community Right to Know Act was discussed. You know, this sort of public pressure is a very powerful force. As we have heard, public corporations value their reputations, and there is no mandate to reduce pollution in the right to know laws, but every year when these release inventories come out, people take note and there is a lot of community pressure to reduce pollution. This bill would hide pollution, and we feel like it is 180 degrees away from the trend the last 10 years of partnership between people and communities and corporations to clean up operations.

Fourth, as you have heard, we agree that this bill would increase litigation. We feel it would so tie the hands of our district attorneys and enforcement officials at the State and Federal level, it is really the effective repeal of the 11 environmental laws that you have listed in this legislation. We feel like if we are going to repeal the Clean Air Act or the Clean Water Act, we ought to do it straight up, not by the back door.

We found it highly ironic—I was sitting by the gentleman from Coors back there—that we have heard in legislatures around the country this Coors horror story of how they were picked on by the department of health there in Colorado. I have gotten the record on that and it appears that this bill wouldn't even affect Coors and their fine in Colorado and that those admissions were part of the exclusions in this bill. So it is fascinating that the No. 1 horror story is not even affected.

We believe that the new EPA audit policy is a very reasonable and responsible approach. We certainly support audits and self-disclosure, but we cannot support the incentive of privileges and immunities which would damage the health of our people, and really it damages our entire judicial system, the creation of a new privilege.

Thank you.

Senator BROWN. Thank you.

[The prepared statement of Mr. Woodall follows:]

PREPARED STATEMENT OF MARK WOODALL

Mr. Chairman and Members of the Committee, my name is Mark Woodall. I am the chair of the Sierra Club's Audit Privilege Task Force as well as the volunteer chair of our Georgia Chapter's Legislative Committee. I want to thank the Subcommittee for allowing me to make a statement on behalf of the 550,000 members of the Sierra Club. The Sierra Club bitterly opposes the creation of new statutory privileges and immunities for corporations that violate environmental, health and safety laws. We therefore strongly oppose S. 582.

Similar legislation in state legislatures around the country has been called the "Right to Poison People and Property and Keep It Secret", "The Pollution Secrecy Act", "The Find It and Hide It Bill", "The Polluter Relief Act", "The Bhopal Bill", and "The Dirty Secrets Act". It could probably most accurately be described as "The Obstruction of Justice Act".

Sierra Club lobbyists and volunteers have now worked in over forty states to defeat audit privilege/immunity legislation since Oregon passed a privilege bill in 1993. According to the latest information I have received, dirty secrets legislation has been rejected in the 1996 session by Alaska, Arizona, Florida, Georgia, Iowa, Maryland, Nebraska, Tennessee, Washington, West Virginia and Wisconsin.

A Georgia legislator observed, "you could hide criminal acts, you could hide any number of things." Another state legislator said, "this bill simply attracts bad actors * * * It gives them a mechanism to avoid civil and criminal prosecution." The sponsor of the bill in Oklahoma had a change of heart. He said, "we held two interim meetings reviewing the bill. I have had staff spend numerous hours looking at it and asked the Office of the Attorney General to review it. I have determined it is a bad bill. This is not an environmental bill, it is a judicial bill. I think even some of the companies which originally supported it are beginning privately to say it is a bad bill."

The Sierra Club is violently opposed to audit privilege/immunity legislation for many reasons. This proposal would create a vast dumping ground for corporate dirty secrets. As the U.S. Supreme Court observed in 1988, "the greater portion of evidence of wrong-doing by an organization or its representatives is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible." Not only would the proposed privilege make it impossible to enforce the laws of the United States, it would prevent victims of pollution from being made whole.

If a person is injured or their property is damaged by pollution, then the responsible parties should be held accountable. The public has a right to every man's evidence according to the Supreme Court, but this proposed privilege would allow critical evidence to be buried in an environmental audit. Potential liability for pollution is now a powerful motivation for preventing pollution. This bill would actually create an incentive to continue polluting as no one could find out that you were polluting.

We believe that progress in reducing pollution is directly related to publicly available information. The Community Right-To-Know Act with its annual toxic release information has been a powerful incentive for pollution reduction even though it doesn't mandate any reduction. This proposed dirty secrets bill is a giant step backward from the sort of full and open disclosure which has been the trend in environmental law for the last decade. This sort of secrecy can only cause distrust and suspicion.

We believe that this bill would actually increase litigation in our crowded courtrooms as judges will be forced to referee constant fighting over which documents were discoverable. We are concerned our enforcement agencies and district attorneys will find their resources are devoted to piercing inappropriately asserted privileges.

We are convinced that this legislation is a threat to worker health and safety. This bill appears to be a direct assault on workers' right to information established by the National Labor Relations Act. Workers represented by a union have the same rights of discovery as plaintiffs in a lawsuit. These rights were recently upheld by the National Labor Relations Board's decision June 30, 1995 in Detroit Free Press vs. The Newspapers Guild Local 22. In what is the most notable attack on worker safety and health, the Texas audit bill applies to occupational safety and health statues at all levels of government.

The proponents of this legislation have failed to establish that a problem exists. The most famous horror story raised to show a need for this legislation is the fine given the Coors Brewing Company for air emissions violations at its Colorado brewery. Dr. Patricia Nolan and Thomas Looby of the Colorado Department of Health have stated that Coors' analysis of air emissions was not voluntary.

"Coors was required by law to analyze their emissions, to report them to the department and to bring the sources into compliance with regulations for volatile organic compounds (vocs)." As this bill excludes information required to be collected by a covered federal law, it appears that Coors' voc situation would in no way have qualified under a voluntary audit law such as S. 582.

We believe that there are far better ways to address the issues that have been raised. Creating broad privileges and immunities would do terrible damage to the search for truth which is the basis of our judicial system. As Michael Barnes, president of the National District Attorneys Association, wrote to Rep. Jack Reed in regards to H.R. 1047: "We want to reiterate that this is an extreme measure far beyond any remedy necessary and that, if you enact a self-audit privilege, you will be doing a vast disservice to law enforcement efforts not only in the realm of environmental law, but across the spectrum of white-collar."

We believe that the EPA's new audit policy provides a reasonable framework for encouraging industry self-evaluation, includes appropriate incentives for violators to report their violations, and rewards self-reporters with significant penalty reductions. The EPA audit policy has been endorsed by the Justice Department, sixteen state attorneys general, The National District Attorneys Association, numerous

state agencies and a raft of public interest groups including the Sierra Club. We believe this policy should be given a chance to work.

Thank you for this opportunity to testify. We urge you not to enact this dangerous legislation which would be so damaging to the public interest as well as the health and safety of our citizens.

Senator BROWN. Mr. Richartz.

STATEMENT OF JERRY O. RICHARTZ

Mr. RICHARTZ. Senator Brown, thank you very much for inviting me. My name is Jerry Richartz and I am corporate manager for Energy and Environment at Oregon Steel Mills. As an environmental manager with Oregon Steel, I am responsible for our company's environmental compliance programs. I am also chairman of the Environment Committee for the Steel Manufacturers Association [SMA]. Both Oregon Steel and the SMA are members of the National Association of Manufacturers [NAM], on whose behalf I also appear before you today.

At the outset, I want to state that Oregon Steel, SMA and NAM strongly support the pending Federal legislation, S. 582, for voluntary environmental audit protection. This legislation would remove the existing disincentives and enforcement risks associated with conducting voluntary environmental audits.

In today's testimony, I will provide a brief explanation of my role at Oregon Steel and with the SMA. I will then elaborate on the need for Federal environmental audit legislation and explain why EPA's recent policy on environmental audits, though helpful, is inadequate. I will conclude with just a few suggestions to help improve the pending Federal legislation, and then I would be happy to answer any further questions.

As the environmental manager for Oregon Steel, I help our company manufacture a variety of quality steel products in an environmentally sound manner. Oregon Steel melts scrap metal and electric arc furnaces to efficiently recycle literally over 5,000 tons of scrap metal each day. The recycling and manufacturing facilities at Oregon Steel employ approximately 1,500 employees in Colorado, 700 employees in Oregon, and 500 employees in California.

The pending legislation for Federal voluntary environmental audit protection would help us implement a consistent and robust voluntary environmental auditing program across all of these facilities. Without the proposed Federal law for voluntary audits and disclosure, there is little, if any, incentive to voluntarily selfaudit.

Oregon Steel is also a member of the Steel Manufacturers Association. The SMA represents 115 steel mills geographically dispersed across the North American continent. In 1995, SMA members recycled scrap metal equivalent to 20 million junked automobiles, or 42 million tons of scrap metal, and saved 765 trillion btu's of energy contained in the recycled scrap metal. SMA members also represent a dynamic and competitive industry, accounting for 40 percent of United States steel shipments. Recycling scrap metal helps prevent the over-burdening of our country's landfills, and we are proud of the positive contribution we make to the Nation's environment.

As chairman of the Environmental Committee for SMA, I want to state clearly that SMA members strongly support the kind of legislative relief offered by the proposed Voluntary Environmental

Audit Protection Act, S. 582. This legislation would facilitate our recycling efforts. SMA also supports this legislation because it promotes a sound environment, a strong economy, and a vigorous industrial sector that allows the United States steel industry to compete effectively in the world steel market. We believe a voluntary environmental audit privilege is truly conducive to the goals of the EPA's common-sense initiative to make environmental regulations clearer, cheaper and smarter.

There are at least two important reasons why we need a Federal statute protecting voluntary environmental audits. First, a Federal statute would eliminate the conflicts with States that have enacted legitimate voluntary environmental audit protection laws. Second, a Federal statute will allow consistent implementation of voluntary environmental audit programs for companies with facilities in more than one State.

With respect to the first reason, the States are sending a powerful message. Seventeen States have enacted voluntary environmental audit protections laws. NAM has member companies in all 17 of these States. SMA member companies have facilities in 11 of the 17 States, and Oregon Steel has facilities in Oregon and Colorado.

I think it is safe to say that both Oregon and Colorado are known for their superb records on the environment and boast some of our country's finest environmental resources. Clearly, the intent of voluntary environmental audit laws in these States is directed at allowing good corporate citizens to become better corporate citizens.

At this point, I would like to address EPA's December 1995 final policy for voluntary environmental self-policing and self-disclosure. We commend EPA for implementing this policy. We appreciate EPA's efforts to create incentives for voluntary self-evaluation of environmental compliance. However, the agency's policy does not and cannot provide all the necessary incentives to encourage companies to voluntarily self-police and self-disclose.

Moreover, the EPA chose to issue guidance rather than adopting a binding rulemaking. Because the agency's guidance is not law, EPA's regions are not bound by the conditions of the policy. Therefore, companies do not have any enforceable rights under EPA's policy. Furthermore, EPA does not have the authority to bind other Federal or State enforcement authorities. This binding authority must come from rulemaking or legislation. By itself, EPA's policy simply cannot eliminate the impediments to improved environmental compliance.

In concluding, I wish to thank this subcommittee and Senators Brown and Hatfield for providing me with the opportunity to express our views on this important matter. Oregon Steel, SMA, and NAM strongly support the pending Federal legislation for voluntary environmental audit protection. This legislation will help us apply our limited financial resources to solving environmental issues rather than litigating over violations that would be better handled as voluntary detections, corrections and disclosures.

On behalf of Oregon Steel, SMA, and NAM, we express our appreciation to Senators Hatfield and Brown for introducing legislation that will enhance compliance with environmental laws, while

also helping to make U.S. industry more efficient and competitive internationally. I would be glad to answer any questions.

Senator BROWN. Thank you.

[The prepared statement of Mr. Richartz follows:]

PREPARED STATEMENT OF JERRY RICHARTZ

On behalf of Oregon Steel Mills, Inc., the Steel Manufacturers Association, and the National Association of Manufacturers, the attached testimony is submitted in strong support of the pending federal legislation, S. 582, for voluntary environmental audit protection. This legislation would remove the existing disincentives and enforcement risks associated with conducting voluntary environmental audits. There is a strong need for S. 582 because it promotes a sound environment, a strong economy, and a vigorous industrial sector. EPA's recent policy on environmental audits, though helpful is inadequate. The policy does not, and cannot, provide all the necessary incentives to encourage companies to voluntarily self-police and self-disclose. Therefore, Oregon Steel, the Steel Manufacturers Association, and the National Association of Manufacturers express appreciation of Senators Hatfield and Brown for introducing legislation that will enhance compliance with environmental laws while also helping to make U.S. industry more efficient and competitive internationally.

My name is Jerry Richartz and I am Corporate Manager for Energy and Environment at Oregon Steel Mills, Inc. As an environmental manager with Oregon Steel I am responsible for our company's environmental compliance programs. I am also Chairman of the Environment Committee for the Steel Manufacturers Association, also referred to as "SMA". Both Oregon Steel and SMA are members of the National Association of Manufacturers or "NAM", on whose behalf I also appear before you today.

At the outset, I want to state that Oregon Steel, SMA and NAM strongly support the pending federal legislation, S. 582, for voluntary environmental audit protection. This legislation would remove the existing disincentives and enforcement risks associated with conducting voluntary environmental audits.

In today's testimony I will provide a brief explanation of my role at Oregon Steel and within SMA. I will then elaborate on the need for federal environmental audit legislation and explain why EPA's recent policy on environmental audits, though helpful, is inadequate. I will conclude with just a few suggestions to help improve the pending federal legislation. Then I would be happy to answer any questions you might have.

As the environmental manager for Oregon Steel, I help our company manufacture a variety of quality steel products in an environmentally sound manner. Oregon Steel melts scrap metal in electric arc furnaces to efficiently recycle literally over 5000 tons of scrap metal each day. The recycling and manufacturing facilities at Oregon Steel employ approximately 1500 employees in Colorado, 700 employees in Oregon, and 500 employees in California. The pending legislation for federal voluntary environmental audit protection would help us implement a consistent and robust voluntary environmental auditing program across all of these facilities. Without the proposed federal law for voluntary audits and disclosures, there is little, if any, incentive to voluntarily self-audit.

Oregon Steel is also a member of the Steel Manufacturers Association. SMA represents 115 steel mills geographically dispersed across the North American Continent. In 1995, SMA members recycled scrap metal equivalent to 20 million junked automobiles (or 42 million tons of scrap metal) and saved 765 trillion Btu's of energy contained in the recycled scrap metal. SMA members also represent a dynamic and competitive industry, accounting for 40% of U.S. steel shipments. Recycling scrap metal helps prevent the overburdening of our country's landfills and we are proud of the positive contribution we make to the nation's environment. As chairman of the Environment Committee for SMA, I want to state clearly that SMA members strongly support the kind of legislative relief offered by the proposed Voluntary Environmental Audit Protection Act, S. 582. This legislation would facilitate our recycling efforts. SMA also supports this legislation because it promotes a sound environment, a strong economy, and a vigorous industrial sector that allows the U.S. steel industry to compete effectively in the world steel market. We believe a voluntary environmental audit privilege is truly conducive to the goals of the EPA's Common Sense Initiative—to make environmental regulations cleaner, cheaper, and smarter.

There are at least two important reasons why we need a federal statute protecting voluntary environmental audits. First, a federal statute would eliminate the con-

flicts with states that have enacted legitimate voluntary environmental audit protection laws. Second, a federal statute will allow consistent implementation of voluntary environmental audit programs for companies with facilities in more than one state.

With respect to the first reason, the states are sending a powerful message. Seventeen states have enacted voluntary environmental audit protection laws. NAM has member companies in all seventeen (17) of these states. SMA member companies have facilities in eleven (11) of the seventeen (17) states. Oregon Steel has facilities in two of the states, Oregon and Colorado. I think it is safe to say that both Oregon and Colorado are known for their superb records on the environment and boast some of our country's finest environmental resources. Clearly the intent of voluntary environmental audit laws in these states are directed at allowing good corporate citizens to become better corporate citizens.

At Oregon Steel, we consider ourselves good corporate citizens. We would like to become better corporate citizens. With the proposed federal legislation, Oregon Steel can become a better corporate citizen by implementing an enhanced voluntary environmental compliance program without fear of increased legal liabilities in any of the states where our facilities are located.

However, the U.S. Environmental Protection Agency has recently set up a task force to monitor the approval of state delegated programs under the Clean Air Act for states with voluntary environmental audit statutes. The Agency has indicated that approval of certain state programs may be delayed or denied because of their state audit privilege statutes. EPA has used this threat to withhold federal program delegation in order to influence pending state legislation. For example, EPA's efforts to influence the State Legislature in Ohio recently prompted a strong response from Donald Schregardus, Director of Ohio's Environmental Protection Agency. Mr. Schregardus agreed with Ohio Congressman William Schuck who described EPA's approach as improper and legally incorrect. Eliciting this kind of reaction from state officials does not promote a healthy federal-state partnership. S. 582 presents an opportunity for the U.S. Congress to control these Agency actions. Federal legislation will allow states the opportunity to fully implement their well-reasoned voluntary environmental audit laws.

The second reason for federal legislation turns on helping a company with facilities in more than one state. Oregon Steel provides a clear example of this problem. We are currently trying to implement a voluntary environmental compliance program across all of our facilities in three different states. Because two states have voluntary environmental audit protection laws and one state does not, we are deterred from having the same program at all of our facilities. Federal legislation would help us develop a consistent and improved company-wide program in all three states. Our voluntary compliance plans would be fostered if we had a federal environmental audit law. For this reason, we urge the Senate to enact federal voluntary environmental audit protection legislation.

At this point I would like to address EPA's December 1995 final policy for "Voluntary Environmental Self-Policing and Self-Disclosure." We commend EPA for implementing this policy. We appreciate EPA's efforts to create incentives for voluntary self-evaluation of environmental compliance. However, the Agency's policy does not, and cannot, provide all the necessary incentives to encourage companies to voluntarily self-police and self-disclose.

The EPA's policy does not provide protection for voluntary environmental audits. This protection must come from legislation. For example, the policy requires public disclosure, but provides no protection from the misuse of disclosed information in non-EPA enforcement actions such as citizen suits, or third-party tort actions. A 1995 Price Waterhouse survey entitled The Voluntary Environmental Audit Survey of U.S. Business indicated that eighty percent (80%) of the survey respondents stated that protecting audit information was important to their companies. Close to half of the survey respondents indicated that expansion of an environmental audit program is hindered by this lack of protection. Federal legislative relief is therefore necessary to adequately support the efforts of companies to develop better voluntary compliance programs.

Moreover, EPA chose to issue guidance rather than adopting a binding rule-making. Because the Agency's guidance is not law, EPA's regions are not bound by the conditions of the policy. Therefore, companies do not have any enforceable rights under EPA's policy. Furthermore, EPA does not have the authority to bind other federal or state enforcement authorities. This binding authority must come from a rulemaking or legislation. By itself, EPA's policy simply cannot eliminate the impediments to improved environmental compliance.

The federal legislation currently pending would provide the relief we seek, but there are a few recommendations I wish to make to improve the bill:

First, the pending federal legislation should make clear that intentional and willful violations of environmental laws do not qualify for civil or criminal immunity.

Second, violations discovered through the operation of an environmental compliance management system should be eligible for penalty mitigation, similar to EPA's environmental audit policy.

Third, the protection afforded by the proposed Voluntary Environmental Audit Protection Act should be extended to state regulatory programs that have been federally delegated or approved. While there are probably other meaningful suggestions that could be made to help develop the pending federal legislation, these three issues are important to Oregon Steel, to the SMA and to the NAM.

In concluding, I wish to thank this Subcommittee and Senators Brown and Hatfield for providing me with the opportunity to express our views on this important matter. Oregon Steel, SMA and NAM strongly support the pending federal legislation for voluntary environmental audit protection. This legislation will help us apply our limited financial resources to solving environmental issues rather than litigating over violations that would be better handled as voluntary detections, corrections, and disclosures. On behalf of Oregon Steel, SMA, and NAM we express our appreciation to Senators Hatfield and Brown for introducing legislation that will enhance compliance with environmental laws while also helping to make U.S. industry more efficient and competitive internationally. I shall be glad to respond to any questions.

STATE OF OHIO ENVIRONMENTAL PROTECTION AGENCY,
Columbus, OH, April 30, 1996.

VALDAS V. ADAMKUS,
Regional Administrator, U.S. Environmental Protection Agency, 77 West Jackson Blvd. Chicago, IL

DEAR MR. ADAMKUS: I am writing to express my concern and disappointment with your letter dated April 26, 1996 to Jeffery A. Skelding, State Program Director, Ohio Chapter of the Sierra Club. In the letter, you raise a number of issues regarding Ohio Senate Bill 138, which would create an environmental audit privilege in Ohio and would provide immunity from civil and administrative penalties under very limited circumstances. You then draw the preliminary, admittedly "premature," and inaccurate conclusion that "enactment of the bill into law would mean that Ohio would no longer have adequate authority to enforce its federally approved Title V program."

Your letter has generated a great deal of misinformation about S.B. 138 and has inappropriately taken the focus of attention away from the bill's intent and long-term purpose: better environmental compliance in the State of Ohio. S.B. 138 encourages companies to proactively look for environmental problems and then promptly fix them. Since S.B. 138 requires diligent followup to violations discovered through an audit, I am confident this legislation will solve environmental problems that otherwise may go unabated. Instead of recognizing S.B. 138 as an additional tool for environmental compliance, your letter has cast doubt on Ohio's ability to administer and enforce our state's environmental programs, a conclusion with which we strongly disagree.

It appears that the concerns you express, as well as the preliminary conclusion you draw, stem from a misinterpretation of the bill. While the points in your letter may be applicable to "model" audit legislation that has passed in other states, we have worked diligently to ensure that S.B. 138 contains proper protections for the public and will not impede our ability to enforce environmental laws. Therefore, I am writing to correct the errors contained in your letter and to assure you that, with or without the passage of S.B. 138, Ohio has adequate authority to enforce not only Title V of the Clean Air Act, but all federally delegated programs.

(1) Ohio EPA does not agree with your contention that an audit privilege will make investigations of criminal behavior more difficult, interfere with enforcement actions or compromise the public's right-to-know. Section 3745.71(C)(4) expressly excludes from the privilege information "required by law to be collected, developed maintained, reported, or otherwise made available to a government agency." Therefore, if an audit bill passes, Ohio EPA will have the same access to information that it has today and will continue to make that same information available to the public.

(2) The bill does not restrict access to important evidence, particularly testimonial evidence. Section 3745.70(D) restricts the privilege to "data documents, records or plans that are necessary to an environmental audit and are collected, developed, made, and maintained in good faith as part of the audit * * *." Section 3745.71(A)(2) grants the privilege to contents of communications only when those

communications "are necessary to the audit and are made in good faith as part of the audit after the employee or contractor is notified that the communication is part of the audit." Again, Ohio EPA would have the same access to evidence that it has today and, according to section 3745.71(C)(5), may obtain such evidence "from a source other than an environmental audit report, including, without limitation, observation, sampling monitoring, a communication, a record, or a report that is not part of the audit on which the audit report is based."

(3) The bill does not inappropriately allow entities to dictate their own pace in correcting violations. Rather, section 3745.71(C)(8) precludes use of the privilege if "the information shows evidence of noncompliance with environmental laws and reasonable efforts to achieve compliance with those laws are not initiated and pursued with reasonable diligence upon discovery through the environmental audit of noncompliance." Thus, your statement that "the privilege portions of the bill would provide no incentive for or encouragement of prompt and expeditious voluntary compliance" is simply unfounded.

(4) Ohio EPA does not agree that delays or increased litigation will result from the in camera hearing procedures in the bill. Rather, we believe that those procedures will provide an important safeguard against abuse of the privilege and will provide Ohio EPA with adequate access to audit information, when necessary.

(5) Your statement that the bill would give immunity to repeat violators, is incorrect. Section 3745.72(E) provides that the immunity "does not apply to the owner or operator of a facility or property who, within the previous year, made a disclosure under this section with respect to particular activity and received immunity under this section with respect to that activity."

(6) Your statement that the bill would deprive the State of the ability to penalize violations of some judicial and administrative orders is also incorrect. Section 3745.72(B)(6) provides that the immunity does not apply where the owner or operator knows or has reason to know "that a government agency charged with enforcing environmental laws has commenced an investigation or enforcement action that concerns a violation of such laws involving the activity."

(7) We strongly disagree with your statement that the bill would undercut the primary purpose of federally delegated programs because it would allow immunity from monetary penalties where violations result in harm or danger. In order to obtain immunity, an owner or operator must conduct an environmental audit, promptly and voluntarily disclose an alleged violation, achieve compliance as quickly as practicable and cooperate with the Agency in investigating the cause, nature, extent and effects of the noncompliance. While an owner or operator may receive immunity from civil and administrative penalties, section 3745.72(D) provides that there will be no immunity from "payment of damages for harm to persons, property, or the environment; the payment of reasonable costs incurred by a government agency in responding to a disclosure; or responsibility for the remediation or cleanup of environmental harm under environmental laws." Again, S.B. 138 provides no immunity for criminal violations.

(8) Your statement that companies may keep an economic benefit from noncompliance, even where that economic benefit is substantial and deliberately obtained, is incorrect. It is true that the bill provides immunity from monetary penalties, even those that would recover economic benefit. However, section 3745.70(A) provides that only audits "designed to improve compliance, or identify, correct, or prevent noncompliance, with environmental laws * * *" meet the definition of "environmental audit" and therefore serve as an appropriate basis for claiming immunity. Deliberate noncompliance would suggest that the audit was conducted in bad faith or for a fraudulent purpose, which, according to section 3745.71(C)(6), disqualifies the audit from the privilege. Most importantly, deliberate noncompliance would suggest criminal activity, which is ineligible for immunity under any circumstances.

Finally, Ohio EPA has worked diligently for more than a year to include in this audit legislation numerous safeguards against abuse of the privilege or immunity. In particular, we sought to include a sunset of the immunity provisions, in order to encourage companies to take quick advantage of the bill's incentives and, therefore, to come into compliance more quickly. The current version of the bill includes a five-year sunset of both the privilege and immunity provisions. It also includes a requirement that Ohio EPA report the impacts of the bill to the General Assembly in the year 2000. Therefore, over the next few years, we will have the opportunity to monitor the bill's impacts and to assess whether the privilege or immunity should be continued.

As I expressed to Dave Ullrich, the factual inaccuracies in your letter to Mr. Skelding made this an especially inappropriate method of not only influencing State legislation, but also advising Ohio of potential programmatic issues. I share the view of Representative William Schuck, Chairman of the Ohio House Energy & En-

vironment Committee and an attorney with impeccable environmental credentials. The "Akron Beacon-Journal" quoted Mr. Schuck's assessment of the letter as, "It's arrogant, it's bullying and it's factually and legally wrong." I have to agree.

We are confident that, even with passage of S.B. 138, Ohio EPA will continue to have the authority and ability to aggressively enforce the environmental laws of this state, including those laws that implement federally delegated programs. We are also confident that passage of S.B. 138 will result in better compliance with environmental laws, an interest we share with U.S. EPA.

If I or my staff may be of assistance to you in reviewing this or other legislation in Ohio, I hope that you will call on us. With respect to this bill and its potential impact on Ohio's Title V approval, I have asked Bob Hodanbosi, chief of our air pollution control division, to communicate with David Kee on these issues. If you would like any additional information, please do not hesitate to contact me.

Sincerely yours,

DONALD R. SCHREGARDUS,
Director.

Senator BROWN. Senator Ament.

STATEMENT OF DON AMENT

Mr. AMENT. Mr. Chairman, thank you for the opportunity to appear before the committee today. Maybe, looking at the committee, we could have done this in Denver last weekend and you would have been part of a much cooler environment.

My name is Don Ament. I am a State senator from the Sterling area and I serve, as you know, about half the year in the Colorado State Senate where I chair agriculture and natural resources. I chair the joint committee on capital development. I do transportation and State affairs. I am currently the chairman of ALEC's [American Legislative Exchange Council] National Task Force on Energy, Environment, Natural Resources and Agriculture.

I ran for office, Senator Brown, primarily because I am a farmer and rancher and I live under a lot of the rules and regulations that are sent to us from Washington, DC, and I never forget the fact that one of the most important industries, one of the most important protectors of the environment are the people I represent out there that farm and take care of the land every single day. You know, so many people take all of that for granted.

I have submitted a complete written statement for the record and ask that you would include that. I also have with me today, in case you want to ask questions that I can't answer—I hope Trish is still here from the attorney general's office, but we also have Dan Demming, who is the new chairman and executive director of ALEC, and also our task force staff director is here, Ross Bell. So in the event I can't answer those questions, Senator Brown, please ask someone that can.

I will make my comments quite brief here today because, being the last one to speak today, I think you have heard a lot of issues. But after hearing Mr. Woodall, I know you don't need any defense, Hank, but it reminds me that this is the senior Senator from Colorado who is the sponsor on this bill and I wonder if people forgot all the leadership that you have put forward in the area while you served in the Colorado Senate. I think of an end stream flow bill that I believe you were cosponsor of, and I think also of the Cash-Laputer wild and scenic river bill that you were part of. I also remember a wilderness bill, I believe, that you were very instrumental in putting forward in 1993.

I would suggest that maybe some of our critics might like to know that you are what Colorado has considered, anyway, as a very prominent Senator and supporter of the environment.

Senator BROWN. I would have called on your earlier if I had known you were going to say all that. [Laughter.]

Mr. AMENT. Maybe, Senator Brown, if I hadn't heard all those things, I wouldn't have said that earlier.

I am here today on behalf of ALEC's task force, and I don't know—I am sure you all know about ALEC, but it is one of the largest bipartisan voluntary membership organizations of more than 3,000 members from across the country. We pay our own dues to belong to this group. We work with environmental organizations and have enlisted the private sector to use their entrepreneurial skill and spirit to help maintain a clean environment.

I will start and give you a little of the background. Sixteen States have enacted some type of privilege legislation as of May 1, 1996, including Arkansas. I would refer you maybe to a statement. I think we all know who the Governor of Arkansas was at that time, and he said in his State of Union message in 1995 that, "We do need more common sense and fairness in our regulations, you bet we do, but we can have common sense and still provide safe drinking water. We can have fairness and still clean up toxic waste dumps." I think that is what this legislation promotes.

Since that timer works faster than those of ours in Colorado, I will move right along. Senator Grassley mentioned to you some concerns about how the people in small business that live under the shadow of the Federal Government react. Let me remind you of the Colorado Pollution Prevention Partnership, Hank. That is an organization with representatives from industry, environment, EPA and the department. They conducted a survey, and when asked if the Government was a good balance to go for and was that a place to go for help, the response was one that really troubles me. It was that EPA was not interested in helping companies be less environmentally damaging.

A second statement, more serious, was that an antagonistic relationship was exposed between small business and the Government. Attitudes toward Government and Government regulation were uniformly negative as to those people that were polled. I want to take that even a little step further because I believe Mr. Herman mentioned the Price Waterhouse poll that was done of over 369 businesses. Sixty-four percent of those respondents stated that they would be encouraged to perform more audits if an enforcement policy eliminated penalties for self-identified reported and corrected violations.

Forty-nine percent of those stated that they would be encouraged to perform more audits if there were a privilege law in effect, and 42 percent of those would be more impressed if there were a State privilege law in effect. Twenty-four percent of the companies said that they would be more encouraged to conduct audits if EPA issued a formal, definitive and specific auditing guideline and protocol.

You know, unfortunately, there is out there a real fear of what is happening in this area of Federal regulation, and I would indicate to you some examples that you are probably well aware of.

One is a Colorado company that had an experience with EPA. After including a 25-percent penalty reduction, EPA assessed a penalty of $196,000 for reporting paperwork discrepancies that were discovered as a result of a voluntary self-evaluation that would have never been found otherwise.

Perhaps the most troublesome example involved a Colorado company that performed a voluntary study that was not required by law, kept the Department informed throughout the study and provided detailed results of the study to the Department. What the voluntary study found was that the EPA guidance documents grossly underestimated air emissions from the types of facilities operated by the company. For identifying sources that had been operated by the company and had been missed by every regulatory agency for similar facilities across the company, the company was rewarded with the assessment of a $1.5 million fine.

This isn't really a surprise to you because you and I worked on an issue very similar when the city of Fort Morgan was fined $44 million because a plant, in their pre-treatment, in their view, had violated guidelines. The city of Fort Morgan, with a population of about 8,000 people, faced a $44 million fine. It is those kinds of activities, I think, and it is that kind of fear—that is what we are trying to eliminate with this bill by giving people an incentive to do something better, an incentive to do what they know is right.

In our last effort—and I will wind this up—we have been requested more than any other model legislation to provide States—we had over 40 States last year that requested this model legislation. We have 25 that have requested it this year. We have sent a State factor out to all those members who have been interested in the new paradigm in environmental enforcement.

We think this bill is an effort to do something in an incentive way to improve our environment and we want to protect those that are willing to come forward and, on their own, address that kind of thing. We don't want this to be a road map to prosecution or the imposition of monetary penalties, but we want this to be an incentive for people to be a good corporate citizen, a good small business citizen. I applaud you on your efforts to again do something positive for the environment.

Thank you.

[The prepared statement of Mr. Ament follows:]

PREPARED STATEMENT OF DON AMENT

INTRODUCTION

In the last few years one of the more common controversies to arise out of the environmental regulatory context is the debate over whether regulated entities that conduct environmental audits should be provided an evidentiary privilege and penalty immunity relief for voluntarily discovered, promptly reported and corrected violations. This testimony will provide an insight into why the establishment of such a privilege for environmental audits and provision of penalty immunity will benefit the environment as well as the regulators and members of the regulated community, i.e., business and governmental entities that must comply with environmental regulatory requirements.

First, it is necessary to describe what is meant by an environmental audit. The U.S. Environmental Protection Agency (EPA) has defined environmental auditing as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." [1] As the result of an audit, a written report is typically presented to management to enable them to determine where their compliance problems are and how to correct

them. Audits may be conducted internally, by the regulated entity's employees, or by outside contractors hired for that purpose. Clearly, the primary function of an environmental audit is to alert the regulated entity to compliance issues so that they may be corrected. Whether regulated entities intend compliance with environmental regulations out of civic responsibility or out of fear of penalties is immaterial; the fact is that if regulated entities have regular systems in place to ensure compliance and to promptly correct noncompliance, the environment and the surrounding community benefit. Likewise, governmental resources can better be directed at those regulated entities that do not make the effort and expenditures to routinely and systematically monitor, expeditiously report and promptly correct noncompliance events.

EVIDENTIARY PRIVILEGE

The issue of an evidentiary privilege for these audits has arisen out of both the perception of many regulated entities, and the reality for a few regulated entities, that audits which they conduct of their own facilities may be used against them by regulators in enforcement actions or by third parties in private lawsuits, despite the fact that the regulated entity discovered the regulatory violation during an audit and has mechanisms in place to promptly report and correct the noncompliance. In other words, a regulated entity may be reluctant to conduct an environmental audit because of fears as to the way in which the audit will be used by others and it may therefore forego an opportunity to enhance its own program of environmental compliance. The current system discourages audits and the identification of environmental compliance problems since entities attempting to improve compliance through audit programs most often are penalized for their efforts. However, if applicable legal and regulatory mechanisms are in place that provide incentives and encouragement for the regulated entity to conduct such an audit, and to correct any problems it finds as a result, then the regulated entity's environmental compliance is more likely to be improved, and so, it can be assumed, will be the environment of the surrounding community.

Arguments against the privilege for environmental audits

The notion of an evidentiary privilege in favor of environmental audits has sparked a vigorous debate in the last several years. Among the arguments against an evidentiary privilege is that it runs counter to the spirit and intention of modern environmental laws, which promote and require public disclosure.[2] This argument assumes that regulatory agencies and private parties are entitled to be able to obtain the results of internal environmental audits so that the environment and public health can be better protected. The concept espoused in this argument is that corporations and other regulated entities have vested interests in veiling their environmental audits in secrecy, and that true environmental protections cannot be achieved unless all internal environmental investigations are made open to the public, and, better yet, that the most protective environmental audits are those that are conducted with input from both regulators and members of the public.[3]

The U.S. Department of Justice (DOJ) and EPA have made similar arguments in their opposition to an evidentiary privilege for audits. In EPA's view, a statutory privilege "* * * could be used to shield evidence of violations of federal environmental law as well as criminal misconduct, deny the public its right to know useful information affecting its health and the environment, drive up litigation costs, and create an atmosphere of distrust between regulators, industry and local communities."[4] EPA's Final Policy Statement on Incentives for Self-Policing, issued on December 18, 1995, reiterates EPA's long-standing opposition to evidentiary privileges for audits. In fact, although EPA's policy states that it will not request audits to initiate environmental investigations, if EPA has "independent reason to believe" that a violation has occurred, the Agency makes clear that it has the authority to seek "any information," possibly including an audit report, relevant to identifying violations or determining liability or extent of harm.[5] "Independent reason to believe" that a violation has occurred is not a significant threshold to meet in order for EPA to request an audit report which may lead the agency to other violations, even as those violations are being addressed by the facility.

EPA's Assistant Administrator for the Office of Enforcement and Compliance Assurance, Mr. Steve Herman, in a February 21, 1996, letter to Michigan State Representative John Freeman discussing proposed Michigan legislation, articulates EPA's position regarding evidentiary privileges for audits. Mr. Herman asserts that Michigan's proposed evidentiary privilege "* * * could hamstring investigations of

Footnotes at end of article.

criminal behavior, interfere even with routine enforcement actions, and compromise the public's right to know."

Mr. Herman, in his letter to Representative Freeman, raises the issue of whether state evidentiary privileges can apply to federal environmental programs administered in the state. This tactic is being used in other states as well; for example, the State of Texas, which adopted an evidentiary privilege for audits in 1995, is currently seeking delegation of the National Pollutant Discharge Elimination System (NPDES) program. Such delegation of authority is authorized to the state under the federal Clean Water Act and the Title V operating permits program under the federal Clean Air Act. However, EPA apparently is delaying the approval of Texas' programs, in part, because of concerns over Texas' audit privilege legislation.[6] In keeping with its long-standing tradition, EPA seems of the view that if it cannot impose its policy directly, it can attempt to impose it by refusing to allow states to implement their own programs under federal environmental laws.

DOJ supports EPA's position and advocates against an evidentiary privilege for environmental audits. "The approach taken in state laws and proposed federal legislation of creating evidentiary privileges for polluters that perform environmental audits or providing statutory immunity for violations by such polluters conceals environmental hazards from the public and public authorities, impairs enforcement, and shields misconduct. Therefore, the Department will continue vigorously to oppose such legislation."[7]

EPA's and DOJ's fears about the effects of evidentiary privileges for audits are unfounded. Their arguments are myths being used to oppose a sensible concept and should be exposed as such.

Arguments in favor of an environmental audit privilege

Myth 1: An evidentiary privilege for environmental audits will shield criminal misconduct.

First, EPA and DOJ believe that evidentiary privileges may shield criminal misconduct. This position apparently arises out of the fact that most privilege statutes include an immunity from prosecution for violations discovered and corrected as a result of audits. In fact, most audit privilege policies limit any privilege and/or immunity to a situation in which a voluntary audit has uncovered a violation and the violation is promptly and effectively corrected. Many such statutes expressly provide that a privilege or immunity is not available in instances of criminal misconduct. For example, the Texas legislation excludes from the immunity provisions those actions that are intentional or knowing violations or reckless violations that result in substantial injury to persons on-site or in substantial harm to persons or property off-site or to the environment.[8] The Texas law also limits its immunity provision to those violations that are reported to the appropriate state agency.[9]

Myth 2: A privilege will hide serious environmental impacts.

EPA and DOJ apparently also believe that privilege and immunity statutes will block discovery of, and remedies for, serious environmental impacts. Audit privilege legislation enacted by the various states requires that the violations which are uncovered be corrected promptly. This requirement will, in and of itself, reduce the chances of serious environmental harm occurring, because the auditing facility has an additional incentive to correct the violation and remedy any harm. Further, privilege laws do not undo the obligation which companies have under a variety of federal, state and local laws to report and remedy any environmental damages. If a state or federal law requires that a spill of a hazardous chemical be reported and cleaned up and any contamination of soil or water be remediated, the existence of an evidentiary privilege for the audit that uncovers the past occurrence of the spill does not change the remediation obligation under law. Certainly the privilege does not alter any liability that an auditing facility has to third parties who may be harmed by that entity's environmental violations. The privilege typically means that, in certain particular circumstances, plaintiffs' lawyers cannot obtain audits and use them as client development devices. In circumstances where there is independent evidence of harm to a third party—in situations of legitimate liability—the fact that a privileged audit exists will neither relieve the perpetrator of liability nor relieve the third party of its burden to prove that their has been environmental harm caused by the defendant's actions.

Myth 3: A privilege prevents the public from having information about their own community.

The argument that a privilege undercuts the public's right to know of the environmental issues in its community ignores the facts that there are legitimate limitations on the right-to-know concept and that state and federal environmental laws already provide for many mandated public disclosures. The Emergency Plan and Community Right-to-Know Act (EPCRA) is based upon the very principle that the

public does have a right to know if there are hazardous chemicals in their communities.[10] This same statute is the source of the annual Toxic Release Inventory (TRI), a report that regulated entities must file every year describing the disposition of any hazardous chemical or substance which has been on their property during that year. Other environmental statutes and regulations require regular reporting of monitoring results from a regulated entity's activities, such as discharge monitoring reports under the federal Clean Water Act. The existence of these self-reporting requirements eases the way for regulators bringing enforcement actions and for private parties to bring citizen suits or toxic tort suits. In any case, there is already a plethora of environmental reporting required by law that likely would not be subject to any audit privilege.

For those regulated entities that conduct environmental audits, in addition to the mandated reporting described above, the presence in the public domain of more information may lead to more allegations of violations, more enforcement actions and more lawsuits, even though those regulated entities are the very ones that, by conducting the audit in the first place, are attempting to attain better compliance. The regulated entities that do not conduct audits may give the appearance of having better environmental compliance, but that may be the result of the fact that failing to look for violations will always lead to a failure to discover violations. After more than 25 years of experience with environmental regulatory programs, it is evident that the "bad actors" often appear to be "good guys" when in fact they have failed to undertake the extra effort to discover and correct situations of noncompliance.

Myth 4: Auditing entities have no need to worry about how audits will be used if they are publicly available.

Though it is true that environmental audits have been used against regulated entities in only a few cases, the potential for information voluntarily collected to be used against the entity in a regulatory action or lawsuit is what motivates its decision whether to proceed with audit programs. A survey of various industries regarding environmental audits found that in the chemical industry (an industry that has certainly benefited from a commitment to auditing), the reason most often cited for not conducting environmental audits was the fear of resulting information being used against the company.[11] The perception that audit results will be used by regulators, prosecutors and plaintiffs' attorneys has caused regulated entities that otherwise could benefit from conducting audits to either refrain from doing so or attempt to use other means to prevent disclosure of findings of violations. For instance, many regulated entities try to protect their audits by using the attorney-client to work product privileges, with the disadvantages and limitations inherent in those privileges. Other entities have decided to write the audit report in such sanitized language that the report does not clearly set forth the discovered violations for those who have the ultimate responsibility of addressing the problems found. These various responses by regulated entities all make sense from a liability perspective, but they do not advance the public policy goal of encouraging regulated entities to diligently seek out their noncompliant activities and correct them.

PENALTY IMMUNITY

In addition to an evidentiary privilege, a companion issue in providing incentives for voluntary compliance is the concept of immunity from penalties for companies that promptly report and correct environmental violations. Some states have adopted penalty immunity without the audit privilege; others have embraced both as related elements in their attempts to encourage regulated entities to investigate, report and correct any violations.

EPA, while it objects to the notion of an evidentiary privilege, has accepted the idea of partial immunity from penalty for reporting and correcting violations.

EPA environmental self-policing policy

In EPA's Final Policy Statement, issued on December 18, 1995,[12] and supported by DOJ, EPA offers to not seek (or reduce) gravity-based (i.e. non-economic benefit) penalties for those facilities that discover violations through voluntary environmental audits or efforts which reflect a regulated entity's due diligence to prevent, detect and correct violations, provided that the company satisfies all of EPA's nine conditions.

EPA will eliminate all of the gravity-based portions of any penalty for violations that are found through auditing, if the violations are promptly disclosed and corrected. If the company demonstrates that it has a compliance management system that meets EPA's criteria for "due diligence," the gravity-based portion of the penalty will also be waived. EPA, however, expressly reserves the right to collect "any economic benefit" that may have accrued to the company as a result of the delay in its compliance.[13] [The "economic benefit of noncompliance" concept for quantifica-

tion of penalty amounts is an agency developed theorem that is the subject of substantial debate.]

Even if the company does not perform an environmental audit and cannot demonstrate that it has a compliance management system qualifying as due diligence, EPA will waive 75% of the gravity-based portion of the penalty if the violation is voluntarily discovered, promptly disclosed and expeditiously corrected and EPA's conditions are met.[14]

EPA will not recommend for criminal prosecution a regulated entity that has voluntarily discovered violations through an audit and has voluntarily disclosed these violations to the government. This immunity from criminal prosecution does not apply where corporate officials are consciously involved or willfully blind to violations or conceal or condone noncompliance.[15]

The conditions that facilities must meet in order to qualify for the immunities described above are: First, discovery of the violation through an environmental audit or "an objective documented, systematic procedure or practice reflecting due diligence" (even if this condition is not met, the company may still be eligible for a 75% reduction in the gravity-based penalty).[16]

Second, voluntary discovery and prompt disclosure to EPA. This condition applies to any violation that is voluntarily discovered, even if the violation is required to be reported under another law or regulation. The immunity does not apply, however, to a violation which is discovered through a required mechanism such as emissions monitoring required by statute or regulation. Such violations are not "voluntarily" discovered.[17]

Third, the disclosure "made to EPA" must be within 10 days of discovery of the violation.[18]

Fourth, discovery and disclosure must be made by the entity independently (i.e. prior to commencement of any regulatory agency inspection; information request; citizen suit notice; legal complaint by third party; whistleblower employee report; or imminent discovery by a regulatory agency.)[19]

Fifth, expeditious correction and remediation. The violation must be corrected within 60 days or the facility must provide written notice to EPA that the violation will take longer than 60 days to correct.[20]

Sixth, prevention of recurrence. The facility must take steps to prevent recurrence of the same violation in the future.[21]

Seventh, no repeat violations. The same or a closely-related violation must not have occurred previously within the past three years at the same facility, or be part of a pattern of violations over the past five years at other facilities owned by the same entity.[22]

Eighth, exclusion of some violations. Penalty immunity is not available for violations of specific terms of an order or consent agreement. Immunity is also not available for violations that result in serious actual harm or an imminent and substantial endangerment to public health or the environment.[23]

Ninth, cooperation. The facility must cooperate with EPA, including possible assistance in determining the facts surrounding the disclosed violation and any related violations that may be suggested by the disclosure.[24]

EPA's policy is quite lenient in some respects. It essentially permits a company that accidentally or otherwise discovers violations to reduce their penalty by 75% through prompt disclosure and correction. The policy is broader in this respect than many similar policies adopted by states. The Texas statute, for example, provides immunity only for violations discovered as a result of environmental audits, and the company must have notified the state in advance of its intention to conduct an audit before the immunity will apply.[25]

The EPA policy also continues to suffer from several shortcomings. For instance, the policy does not apply "where corporate officials are consciously involved in or willfully blind to violations or conceal or condone compliance."[26] Thus, culpability of corporate officials is left wide open to interpretation, since reasonable people can differ over what condoning non-compliance means or what sequence of events constitutes "willfully blind to violations."

Shortcomings of EPA environmental self-policing policy

EPA uses the breadth of its policy as an argument that no evidentiary privilege for environmental audits is necessary. To the contrary, a company is not adequately protected by the penalty immunity alone.

EPA's waiver of penalties and commitment not to seek disclosure of audits as an enforcement tool does not prevent a company from being subject to enforcement at the state or local level or to third party lawsuits by prosecutors and plaintiffs' lawyers who inevitably will seek to obtain an audit to use as a litigation guide. The agency has also cleverly disguised its intent as to how environmental audit reports

will be treated under the new self-policing policy. The certainty provided by EPA is that invitation of environmental investigations will not be premised upon requests for audits.[27] However, if EPA has "independent reason to believe" that a violation has occurred—EPA also makes clear that authority to seek "any information" relevant to finding violations.[28] What constitutes "independent reason to believe" is left to the reader's imagination! Is it a citizen complaint? What about allegations made by a disgruntled or recently discharged employee? Or, better yet, an EPA employee being aware of a violation of a minor recordkeeping requirement certainly meets this low threshold for requesting an environmental audit. Likewise, as DOJ has clearly stated once it has received information that a regulated entity has committed violations of environmental law, "the Department seeks all relevant information, including audit reports."[29]

EPA's policy is one step toward a full realization that environmental protection must rely on voluntary compliance, and it is a good step. Unfortunately, however, EPA has steadfastly refused to take the next logical step that would move environmental protection into a new realm of compliance, supporting an evidentiary privilege for environmental audits and full penalty immunity for those acting in good faith to promptly report and correct noncompliant situations. Only when both steps are taken together will we have in place positive incentives that generate the sort of "ownership" of environmental issues by the upper management level of all regulated entities of all sizes and types to take aggressive and affirmative steps to protect the environment.

CURRENT STATUS OF STATE LEGISLATION

The public policy goal of enlisting the private sector in efforts to maintain a clean environment and the obvious advantage of evidentiary privilege in achieving that goal are such that sixteen (16) states have enacted some type of privilege legislation as of May 1, 1996. (*e.g.*, Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, Texas, Utah, Virginia, and Wyoming.) Penalty immunity of some type is also provided in the laws of twelve (12) of those states (Colorado, Idaho, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, South Dakota, Texas, Virginia and Wyoming).

As of May 1, 1996, nine (9) other states including Alabama, Alaska, California, North Carolina, Oklahoma, New Jersey, Ohio, Tennessee, and South Carolina, were considering privilege and/or immunity bills, which had already passed one branch of the Legislature. Various other states, *e.g.*, Delaware, Florida and Pennsylvania also had legislation pending that related to establishing incentives for voluntary discovery and prompt reporting and corrective action of environmental noncompliance events.

CONCLUSION

Environmental regulations are pervasive, voluminous and highly technical. Perfect compliance with them is a near-impossibility, and the chances of achieving high levels of compliance decrease with ever-increasing levels of complexity in the regulatory requirements. Given the expansive applicability of environmental requirements to virtually every business and governmental entity and the shortage of resources within federal and state governments, regulatory agencies are finding it increasingly difficult to adequately monitor compliance. Private citizens also lack the resources, as well as the knowledge, to regularly monitor the compliance of a complex industrial facility or major municipality whose operations are governed by highly technical environmental regulations. Typically, most citizens and some regulators do not become aware of a compliance problem until it is too late and the environment, or worse, human health, is affected. As societal attitudes have changed and developed in the past twenty-five years, the entity with the greatest resources, the greatest knowledge, and ultimately, the greatest interest in assuring compliance has become the regulated entity itself. Therefore, it only makes sense that the most effective tool toward environmental protection is the ability of the regulated entity to discover and correct its environmental compliance problems, before they become serious issues for the entire community. However, if the regulated entity legitimately fears that its very attempt to be a good citizen will result in lawsuits and enforcement actions over violations that might otherwise never have come to light, it will naturally be reluctant to conduct thorough audits. This result shortchanges our citizenry and the environment.

Typically, environmental audit privileges are not absolute. They do not usually protect the underlying facts, and a regulated entity will lose the privilege if it is determined to have claimed it fraudulently. Through public education it is possible that some of the opposition to the environmental audit privilege can be eliminated.

People should be assured that the privilege will not apply to those who claim it fraudulently, to information which is required to be reported under some other law, to deliberate violations of the law or in situations of imminent and substantial endangerment to the environment and human health. In other words, the issues about which most people are likely to be concerned are likely not to be covered by the privilege. On the other hand, the granting of the privilege, provide those regulated entities that are genuinely striving toward environmental compliance a tool to use in achieving compliance in the most effective way possible, without fear that that tool will be used to punish them for discovering, reporting and correcting their own violations.

Audit privileges and penalty immunities are, nevertheless, an incentive for regulated entities to conduct environmental audits. These audits promote candid, effective discussions within regulated entities as to the causes of, and solution to, environmental noncompliance. By removing the incentive to not identify or hide noncompliance, the regulated entity can actually address the problem in the most constructive way possible and government can be assured that more entities will be encouraged to address their compliance status forthrightly.

Environmental regulation has for the last twenty-five years focused on the "command and control" model. As a result, we have developed an extremely complicated regulatory scheme, while government at all levels lacks the resources necessary to ensure compliance by all members of the regulated community. Thus, the model for environmental regulation has become outdated and needs to change. The move to an environmental regulation model that focuses on and encourages voluntary compliance is the key to further rational regulation to protect environmental values. It is in the best interest of any regulated entity to be a good corporate citizen, and to the extent that an entity is free to investigate itself without the fear of providing a "road map to prosecution" or the imposition of monetary penalties for its good behavior that entity will be better able to attain compliance with the regulations and to ensure environmental protection. In addition, our regulatory agencies will be able to direct their limited enforcement resources at those among the regulated community that do not strive to be good citizens.

FOOTNOTES

[1] "Incentives for Self-Policing," EPA Final Policy Statement, 60 Fed. Reg. 66706, 66710 (December 22, 1995).

[2] See, i.e., Ronald, David. "The Case Against an Environmental Audit Privilege", National Environmental Law Journal, September 1994.

[3] See, i.e., Lewis, Sanford. "Moving Forward Toward Environmental Excellence: Corporate Environmental Audits and the Public's Right to Know." The God Neighbor Project for Sustainable Industries, February 1, 1995.

[4] "Incentives for Self-Policing" EPA Fact Sheet, December 18, 1995, p. 2.

[5] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[6] "Federal regulators concerned about Texas environmental law," Austin American-Statesman, February 28, 1996 stating that the Deputy Administrator of EPA, Fred Hansen, said "the [Texas] law could be an obstacle for a state plan to administer the key program under the Federal Clean Air Act" [title V operating permits].

[7] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

[8] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(b)(7), 1995 Tex. Sess. Law Serv. 1963 (Vernon).

[9] Id at § 10(b)(1).

[10] 42 U.S.C.A. §§ 11001 to 11050.

[11] See, Price Waterhouse, L.L.P., "The Voluntary Environmental Audit Survey of U.S. Business," March 1995.

[12] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violation" 60 Fed. Reg. 66706, December 22, 1995.

[13] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

[14] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[15] Id.

[16] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[17] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[18] Id.

[19] Id.

[20] Id.

[21] Id.

[22] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

[23] 60 Fed. Reg. 66706, 66712 (December 22, 1995).

[24] Id.

[25] Texas Environmental, Health and Safety Audit Privilege Act, 74th Leg., R.S., Ch. 219 § 10(g) Tex. Sess. Law Serv. 1963 (Vernon).

[26] 60 Fed. Reg. 66706, 66711 (December 22, 1995).

[27] 60 Fed. Reg. 66706, 66711 (December 22, 1995).
[28] Id.
[29] January 31, 1996 letter from Lois J. Schiffer, Assistant Attorney General, Environment and Natural Resources Division, U.S. Department of Justice to Steven Herman, Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency.

Senator BROWN. Thank you. You all have been most patient and kind, so I won't try and delay much further, but I wanted to see if we could get some confessions against interest in these last few things.

Mr. Richartz, you made the statement that there is little or no incentive to voluntarily self-audit or self-report. My impression is that if a company or if an operation declines to self-audit or report, it is commonly believed that they are more likely to get the attention of the EPA or other enforcement entities. Would that be a fair statement?

Mr. RICHARTZ. Not necessarily fearful of getting the attention of the EPA. We go to great lengths, frankly, to do modified types of audits in our plants under attorney-client privilege and it becomes more of a factor of increased cost for little gain potentially that may occur. If we were to have the environmental audit privilege, we would go ahead probably with audits that would be more in-depth, and go ahead and simply work with the agency, as we have in Oregon and Colorado, as well as California. So we are not really fearful. We have our plants open to tours by groups that are neighborhood groups, and so we are not afraid of the public either. We just want to be treated fairly.

Senator BROWN. Thank you. Mr. Woodall, you were kind enough to go through some of the privileges in Georgia, I think you made a reference to. In your mind, is it fair to compare a self-audit to the fifth amendment protection against self-incrimination?

Mr. WOODALL. No, sir; I don't go along with that comparison because I don't believe that corporations deserve the same protection as people. I mean, the Bill of Rights was set up to protect the people of the United States, not the creatures of the States, the corporations. So I wouldn't go along with that analysis at all.

Senator BROWN. Individuals that might have personal responsibility—wouldn't you say that there is an analogy there?

Mr. WOODALL. Well, that came up for quite a bit of discussion in the roundtables that were alluded to between all the interested parties as to how you would get at the individual rather than the corporation, and Mr. Herman touched on that earlier. I am not really competent as—I am not an attorney, so I don't think I had better get into that, actually, how that should work.

Senator BROWN. I don't know as it puts you at any disadvantage. It may put you at an advantage. The reason I brought it up is because it seems to me the core of this question is whether or not you get more information about misdeeds with regard to the environment through this process than you would if you didn't have it.

Obviously, you represent an organization that is deeply concerned about the environment. Is it your belief that you are not going to get significant new information, or you won't get new information in this way?

Mr. WOODALL. No, sir; I wouldn't contend that. There may be some information that comes out because of this. I guess it is our contention that the price we pay for getting that information is too

great. To take away the rights of the third parties next door, to take away the rights of the employees, the workers—that is what you are getting into when you get into making this information privileged, so we feel it is too high a price to pay. It is an improper incentive.

Senator BROWN. By taking away the rights, you mean their right to seek civil action?

Mr. WOODALL. Yes, sir. I mean, we had in Georgia—Representative Robert Ray is a State representative. You may remember his brother, Congressman Ray, from Peach County. He was out there in his pecan orchard doing some irrigation. He reached down and it tasted like pure gasoline. He came to find out the major gasoline pipeline that runs through Georgia north-south runs through his farm there. It took him years of litigation before he ever recovered from the big oil companies, you know. He had a lot of trouble getting a hold of documents.

I mean, there is an awful lot of trouble getting evidence now. Our people have to go through very extensive discovery. If we get into these new privileges, I mean I think it would be impossible to reach a settlement in a case like that.

Senator BROWN. Would any of the problems in getting evidence there relate to self-audits?

Mr. WOODALL. No. I think that would probably go under the hypothetical situation.

Senator BROWN. Senator Ament, you have had a chance to observe the Colorado statute for some years. What is your view with regard to the impact it has had in terms of disclosing problems in Colorado and getting them corrected?

Mr. AMENT. I think we started this, as you may recall, in 1989, and finally by 1994 passed the first bill. It has had an impact; certainly, not as much as we might hope, and I think that is still a fear that is out there that is expressed to you from some of these various studies that we have done, the fear of overfiling, and so on, by the Feds. It is just something that still is limiting the process.

So I think that is why I am here today. That is why our task force, I think, has been asked for so much of this overview, and so on. The thing that you are doing here is part of the puzzle. There is still a fear that big brother is going to step on them, and I think this is an important piece to go along with what the States are doing.

Senator BROWN. Let me thank this panel and the other panels for their testimony. I think it is a very helpful hearing. As you know, while not all our members are here, their staffs are here. The information that has been presented, I think, is very helpful and will be helpful in trying to work on the statute itself. Thank you for coming.

[Whereupon, at 4:29 p.m., the subcommittee was adjourned.]

40-017 97 - 4

APPENDIX

PROPOSED LEGISLATION II

104TH CONGRESS
1ST SESSION

S. 582

To amend title 28, United States Code, to provide that certain voluntary disclosures of violations of Federal laws made pursuant to an environmental audit shall not be subject to discovery or admitted into evidence during a Federal judicial or administrative proceeding, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 21 (legislative day, MARCH 16), 1995

Mr. HATFIELD (for himself and Mr. BROWN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend title 28, United States Code, to provide that certain voluntary disclosures of violations of Federal laws made pursuant to an environmental audit shall not be subject to discovery or admitted into evidence during a Federal judicial or administrative proceeding, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Voluntary Environmental Audit Protection Act".

SEC. 2. VOLUNTARY SELF-EVALUATION PROTECTION.

(a) IN GENERAL.—Part VI of title 28, United States Code, is amended by adding at the end the following new chapter:

"CHAPTER 179—VOLUNTARY SELF-EVALUATION PROTECTION

"§ 3801. Admissibility of environmental audit reports

"(a) GENERAL RULE.—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), an environmental audit report prepared in good faith by a person or government entity related to, and essentially constituting a part of, an environmental audit shall not be subject to discovery and shall not be admitted into evidence in any civil or criminal action or administrative proceeding before a Federal court or agency or under Federal law.

"(2) EXCLUSIONS.—Paragraph (1) shall not apply to—

"(A) any document, communication, data, report, or other information required to be collected, developed, maintained, or reported to a

regulatory agency pursuant to a covered Federal law;

"(B) information obtained by observation, sampling, or monitoring by any regulatory agency; or

"(C) information obtained from a source independent of the environmental audit.

"(3) INAPPLICABILITY.—Paragraph (1) shall not apply to an environmental audit report, if—

"(A) the owner or operator of the facility that initiated the environmental audit expressly waives the right of the person or government entity to exclude from the evidence or proceeding material subject to this section;

"(B) after an in camera hearing, the appropriate Federal court determines that—

"(i) the environmental audit report provides evidence of noncompliance with a covered Federal law; and

"(ii) appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence; or

"(C) the person or government entity is asserting the applicability of the exclusion under this subsection for a fraudulent purpose.

"(b) DETERMINATION OF APPLICABILITY.—The appropriate Federal court shall conduct an in camera review of the report or portion of the report to determine the applicability of subsection (a) to an environmental audit report or portion of a report.

"(c) BURDENS OF PROOF.—

"(1) IN GENERAL.—Except as provided in paragraph (2), a party invoking the protection of subsection (a)(1) shall have the burden of proving the applicability of such subsection including, if there is evidence of noncompliance with an applicable environmental law, the burden of proving a prima facie case that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence.

"(2) WAIVER AND FRAUD.—A party seeking discovery under subparagraph (A) or (C) of subsection (b)(3) shall have the burden of proving the existence of a waiver, or that subsection (a)(1) has been invoked for a fraudulent purpose.

"(d) EFFECT ON OTHER RULES.—Nothing in this Act shall limit, waive, or abrogate the scope or nature of any statutory or common law rule regarding discovery or admissibility of evidence, including the attorney-client privilege and the work product doctrine.

"§ 3802. Testimony

"Notwithstanding any other provision of law, a person or government entity, including any officer or employee of the person or government entity, that performs an environmental audit may not be required to give testimony in a Federal court or an administrative proceeding of a Federal agency without the consent of the person or government entity concerning the environmental audit, including the environmental audit report with respect to which section 3801(a) applies.

"§ 3803. Disclosure to a Federal agency

"(a) IN GENERAL.—The disclosure of information relating to a covered Federal law to the appropriate official of a Federal agency or State agency responsible for administering a covered Federal law shall be considered to be a voluntary disclosure subject to the protections provided under section 3801, section 3802, and this section if—

"(1) the disclosure of the information arises out of an environmental audit;

"(2) the disclosure is made promptly after the person or government entity that initiates the audit receives knowledge of the information referred to in paragraph (1);

"(3) the person or government entity that initiates the audit initiates an action to address the issues identified in the disclosure—

"(A) within a reasonable period of time after receiving knowledge of the information; and

"(B) within a period of time that is adequate to achieve compliance with the requirements of the covered Federal law that is the subject of the action (including submitting an application for an applicable permit); and

"(4) the person or government entity that makes the disclosure provides any further relevant information requested, as a result of the disclosure, by the appropriate official of the Federal agency responsible for administering the covered Federal law.

"(b) INVOLUNTARY DISCLOSURES.—For the purposes of this chapter, a disclosure of information to an appropriate official of a Federal agency shall not be considered to be a voluntary disclosure described in subsection (a) if the person or government entity making the disclosure has been found by a Federal or State court to have committed repeated violations of Federal or State laws, or orders on consent, related to environmental quality, due to separate and distinct events giving rise to the violations, during the 3-year period prior to the date of the disclosure.

"(c) PRESUMPTION OF APPLICABILITY.—If a person or government entity makes a disclosure, other than a disclosure referred to in subsection (b), of a violation of a covered Federal law to an appropriate official of a Federal agency responsible for administering the covered Federal law—

"(1) there shall be a presumption that the disclosure is a voluntary disclosure described in subsection (a), if the person or government entity provides information supporting a claim that the information is such a voluntary disclosure at the time the person or government entity makes the disclosure; and

"(2) unless the presumption is rebutted, the person or government entity shall be immune from any administrative, civil, or criminal penalty for the violation.

"(d) REBUTTAL OF PRESUMPTION.—

"(1) IN GENERAL.—The head of a Federal agency described in subsection (c) shall have the burden of rebutting a presumption established under such subsection. If the head of the Federal agency fails to rebut the presumption—

"(A) the head of the Federal agency may not assess an administrative penalty against a

person or government entity described in subsection (c) with respect to the violation of the person or government entity and may not issue a cease and desist order for the violation; and

"(B) a Federal court may not assess a civil or criminal fine against the person or government entity for the violation.

"(2) FINAL AGENCY ACTION.—A decision made by the head of the Federal agency under this subsection shall constitute a final agency action.

"(e) STATUTORY CONSTRUCTION.—Except as expressly provided in this section, nothing in this section is intended to affect the authority of a Federal agency responsible for administering a covered Federal law to carry out any requirement of the law associated with information disclosed in a voluntary disclosure described in subsection (a).

"§ 3804. Definitions

"As used in this chapter:

"(1) COVERED FEDERAL LAW.—The term 'covered Federal law'—

"(A) means—

"(i) the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. 136 et seq.);

"(ii) the Toxic Substances Control Act (15 U.S.C. 2601 et seq.);

"(iii) the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.);

"(iv) the Oil Pollution Act of 1990 (33 U.S.C. 2701 et seq.);

"(v) title XIV of the Public Health Service Act (commonly known as the 'Safe Drinking Water Act') (42 U.S.C. 300f et seq.);

"(vi) the Noise Control Act of 1972 (42 U.S.C. 4901 et seq.);

"(vii) the Solid Waste Disposal Act (42 U.S.C. 6901 et seq.);

"(viii) the Clean Air Act (42 U.S.C. 7401 et seq.);

"(ix) the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 et seq.);

"(x) the Emergency Planning and Community Right-To-Know Act of 1986 (42 U.S.C. 11001 et seq.); and

"(xi) the Pollution Prevention Act of 1990 (42 U.S.C. 13101 et seq.);

"(B) includes any regulation issued under a law listed in subparagraph (A); and

"(C) includes the terms and conditions of any permit issued under a law listed in subparagraph (A).

"(2) ENVIRONMENTAL AUDIT.—The term 'environmental audit' means a voluntary and internal assessment, evaluation, investigation or review of a facility that is—

"(A) initiated by a person or government entity;

"(B) carried out by the employees of the person or government entity, or a consultant employed by the person or government entity, for the express purpose of carrying out the assessment, evaluation, investigation, or review; and

"(C) carried out to determine whether the person or government entity is in compliance with a covered Federal law.

"(3) ENVIRONMENTAL AUDIT REPORT.—The term 'environmental audit report' means any reports, findings, opinions, field notes, records of observations, suggestions, conclusions, drafts, memoranda, drawings, computer generated or electroni-

cally recorded information, maps, charts, graphs, surveys, or other communications associated with an environmental audit.

"(4) FEDERAL AGENCY.—The term 'Federal agency' has the meaning provided the term 'agency' under section 551 of title 5.

"(5) GOVERNMENT ENTITY.—The term 'government entity' means a unit of State or local government.".

(b) TECHNICAL AMENDMENT.—The analysis for part VI of title 28, United States Code, is amended by adding at the end the following:

"179. Voluntary Self-Evaluation Protection ..... 3801".

SEC. 3. APPLICABILITY.

This Act and the amendment made by this Act shall apply to each Federal civil or criminal action or administrative proceeding that is commenced after the date of enactment of this Act.

○

Questions and Answers

Responses From Don Ament to Questions From Senator Grassley

Question 1. EPA claims that state audit privilege and/or immunity legislation potentially affect a state's ability to enforce environmental laws, and that EPA will need to evaluate the impact of individual state statutes on state enforcement programs. What has been your state's experience with EPA and its review of your state legislation regarding audit privilege and/or disclosure immunity?

Answer 1. I am not familiar with the State of Colorado's experience and its discussions with EPA representatives, beyond that information which Ms. Bangert of the Colorado Attorney General's office provided in her testimony and oral remarks at the Subcommittee hearing.

Question 2. EPA and others claim that the privilege as proposed in S. 582 would eliminate all punishment for certain criminal and other violations that are voluntarily disclosed regardless of harm, basically giving total immunity to companies which have committed environmental violations. EPA and DOJ testified that the immunity provisions in S. 582 would allow a company to escape prosecution even for criminal conduct merely by confessing and belatedly taking corrective action.

Question 2a. Could you please respond to these concerns? What are the safeguards in the privilege that are in, or should be in, S. 582 that will ensure bad actors and criminal activity are not protected?

Answer 2a. S. 582 may be amended to conform with state legislation in this area which exempts certain criminal acts, *e.g.*, intentional or knowing violations. A number of safeguards to ensure that bad actors and criminal activity is not protected are contained in S. 582. For instance, the audit must be "prepared in good faith" [Sec. 3801(a)(1)] and must not be for a fraudulent purpose [Sec. 3801(a)(c)]. In addition, the privilege does not apply unless efforts to achieve compliance are not promptly initiated and pursued with reasonable diligence.

Question 2b. How have your states dealt with this problem? Specifically, how did you craft your legislation to make sure that safeguards were in place?

Answer 2b. The Colorado law provides no immunity for intentional knowing or serious violations that constitute a pattern of continuous or repeated violations. Moreover, and most importantly, the privilege will be lost and the immunity is not available if compliance is not pursued with due diligence and the discovered violation has not been corrected within, at most, a period of 2 years.

Question 2c. How do your states take care of situations where you have an environmental emergency—can the regulator come in with cease and desist orders or some other type of relief to enforce the law?

Answer 2c. The Colorado law places no additional restrictions on the state agency's ability to obtain a cease and desist order, other than rebutting the presumption that the disclosure was made voluntarily. Only violations that are discovered through an audit receive any immunity and environmental emergencies almost always are immediate and obvious. Thus, it is very unlikely that an environmental emergency will be discovered through an audit.

Question 3. EPA and other opponents to S. 582 claim that the proposed bill encourages litigation because it does not adequately define what falls within the scope of an audit. In order to evade disclosure, violators could argue that many routine business activities are "compliance evaluations." Further, they claim that the "reasonable efforts" standard to correct environmental violations is unclear, and that the "compelling circumstances" the government would have to determine to overcome the privilege in a criminal investigation are also vague.

Question 3a. How would you respond to these criticisms? Also, how would you delineate the parameters of the term "voluntary environmental self-evaluation"?

Answer 3a. The language of the bill can be crafted to avoid encouragement of litigation, as was done in Colorado. Based on what I know from Colorado, and what I heard at the hearing about the Texas experience with its law, exactly the opposite seems to be taking place, the laws encourage "getting to the solution" behavior. I do not find the phrase "environmental self-evaluation" in S. 582, rather the phrases "environmental audit" and "environmental audit report" are defined terms. Nevertheless, I think a "voluntary environmental self-evaluation" is a critical analysis performed on a voluntary basis by or on behalf of a regulated entity in an effort to ascertain its performance or compliance with applicable requirements.

Question 3b. Could this privilege actually increase litigation because parties will argue about the limits of what is and what is not protected? What has been the experience in your state?

Answer 3b. To the best of my knowledge, the experience in Colorado has been a decrease in litigious activity; however, the State Attorney General's office would have more complete information available to it than I possess on this aspect.

Question 3c. Does the audit privilege in S. 582, as currently drafted, protect factual data as well as legal conclusions? Doesn't this restrict access to important evidence, including testimonial evidence, that would determine whether a violation has occurred or whether a potential environmental disaster might be possible?

Answer 3c. S. 582 is open to the interpretation that it protects disclosure of underlying facts. The Colorado Attorney General's office response to this question correctly states how our statute deals with this issue.

Question 3d. Opponents of the bill claim that S. 582 would provide penalty immunity even where violations result in serious harm or imminent and substantial endangerment, thus undercutting the primary purpose of federally delegated programs to protect public health and the environment. Do you agree with this criticism? Do you believe that this deprivation of penalty authority would limit a state's leverage in negotiating an appropriate remedy for any damage that may have been caused or injunctive relief that may be necessary?

Answer 3d. The experience that I am most aware of is that environmental solutions are delayed or have become secondary, while the lawyers become focused on extended negotiation of the language related to, and the amount of penalties, both for past activity and stipulated penalties for any possible future non-compliance. Whatever additional leverage is lost with the granting of a penalty immunity appears to be offset by the threat of losing privilege or immunity protection if corrective action is not expeditious. In my view, the state's leverage still exists.

Question 4. According to S. 582, the protection for audit reports would only apply where a federal court has determined that identified instances of non-compliance have been promptly corrected and where the protection was not sought for fraudulent purposes.

Question 4a. Will qualified audit protection legislation prevent the government from obtaining crucial data about a company's non-compliance?

Answer 4a. Audit protection legislation does not prevent the government from obtaining crucial data about non-compliance so long as all existing enforcement powers other than penalties are kept in place.

Question 4b. Do you agree with EPA's criticism of S. 582 that the bill allows regulated entities to dictate their own pace in correcting violations because it only calls for corrective action or elimination of a violation by the exercise of "reasonable diligence"? EPA also has claimed that compliance might be slower than would be in the best interests of protecting public health and the environment. What is your response? Additionally, doesn't waiting for correction of the violation present a problem? Is it clear that the problem would have to be corrected in order for the privilege to apply?

Answer 4b. How it is possible for EPA to read Section 3801(c)(1) of S. 582 which provides that the regulated entity is required to demonstrate "that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence" (emphasis added) only demonstrates how disingenuous the federal agency employees have become in their efforts to thwart the state efforts to bring about the new paradigm in environmental enforcement. It is clear that timely correction of the problem is the linchpin to both the existence of the privilege and the grant of penalty immunity. For EPA to argue that this legislation might lead to slower compliance is patently ridiculous since any compliance response that compromises public health and the environment is not "appropriate".

Question 4c. Could you elaborate on why the privilege/immunity as provided in S. 582 is preferable to EPA's policy of penalty mitigation in terms of promoting company self-evaluations and compliance with environmental regulations?

Answer 4c. Enactment of federal law providing both privilege and penalty immunity would provide certainty to the regulated community. On the other hand, EPA's policy is unlikely to be consistently applied by its various Regional Offices, is not binding upon U.S. Attorneys and DOJ, does not provide any protection from use or misuse by others of sensitive information gained through an environmental audit (thus constituting an encouragement for regulated entities to create a road map to future litigation being brought against them) and contains various ambiguities which leaves wide open to interpretation as to when and how their policy applies.

RESPONSES FROM DON AMENT TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than in its absence?

Answer 1. This audit legislation should be evaluated on the basis of whether its adoption and implementation will lead us to achieving a cleaner and healthier environment in a more rational manner than takes place under the historical enforcement first approach. The Colorado statute, which strikes a proper balance as to compliance incentives versus enforcement, is an effective tool in achieving compliance. Our state law establishes the framework for a collaborative and cooperative effort to expeditiously address and resolve non-compliance situations.

Question 2. Would any of you care to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing and fighting over technicalities and unhelpful questions of interpretation?

Answer 2. Our limited state resources in Colorado need to be focused on problem-solving and ensuring compliance as opposed to legal battles over interpretations of complex technical language and issues, many of which have little, if any, actual threat to the environment. The Colorado statute has proven to be effective in avoiding the legal wrangling, and focuses both the regulator and the regulated entity on compliance and remediation of any problems that may have been discovered.

Question 3. As the Chairman of the Antitrust, Business Rights, and Competition Subcommittee, I am interested in each of your views on whether it is desirable to attempt to protect competition by imposing fines based on any "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to be addressed, or would the cure be worse than the problem?

Answer 3. The short answer to the two important issues raised in your question is that following the rationale of both DOJ and EPA leads to "a cure that is much worse than the problem." EPA's expressed concern at the hearing about whether penalty immunity for the economic benefit of a non-compliance that has occurred for an extended period (some 10 to 15 years) would have an inequitable effect on compliant companies, merely demonstrates that regulatory and enforcement programs being operated by EPA and others are rather ineffective, otherwise a violation would not continue for over such a period without detection. Thus, if the current federal and state enforcement mechanism have been unable to detect such a violation, creation of incentives for the regulated community to self-police these difficult-to-detect violations, report them, and bring their facility into compliance, are even more important. The environment benefits from discovery and correction of violations, not from the number of violations detected and penalty dollars collected (the latter are promotional grading mechanisms employed by regulators). A much more sensible public policy (rather than struggling with the nebulous concept of "economic benefit of non-compliance") is to create incentives for regulated entities to expeditiously come into compliance, which necessarily requires an equal or very significant economic expenditure—and to ensure that they continue in compliance in the future. Correction of transgressions and ensuring a level economic playing field into the future is much more important than trying to speculate about any indeterminable past dollar differential between regulated entities to what each spent on environmental controls.

RESPONSES FROM PATRICIA S. BANGERT TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. EPA claims that state audit privilege and/or immunity legislation potentially affect a state's ability to enforce environmental laws, and that EPA will need to evaluate the impact of individual state statutes on state enforcement programs.

a. What has been your states' experience with EPA and its review of your state legislation regarding audit privilege and/or disclosure immunity?

Answer 1. The EPA has made it clear that it will scrutinize delegated programs in states with privileges and immunities laws to determine whether those states have the necessary enforcement authorities to maintain those programs.

Recently, EPA has raised the issue of whether Colorado's privileges and immunities law will prevent the agency from approving the state's application to take over certain programs under the Clean Water Act. Specifically, EPA has imposed hurdles to the approval for delegation of the federal facilities, pretreatment and biosolids programs to the state.

Of broader application, EPA headquarters has recently released a memorandum providing guidance to its regions in evaluating the effect of privilege/immunity laws on state air programs. The memorandum clearly suggest that such state laws may take away the enforcement authority needed for states to carry out the Title V permit programs. Without going into great detail here, we believe the memorandum is written in such broad terms that it could potentially result in the withdrawing of Title V delegation in many states with privilege and immunities laws.

These express and implied threats by EPA to withdraw delegation under the Clean Water and Clean Air Acts have an additional chilling effect on the implementation of state privileges and immunities laws.

Question 2. EPA and others claim that the privilege as proposed in S. 582 would eliminate all punishment for certain criminal and other violations that are voluntarily disclosed regardless of harm, basically giving total immunity to companies which have committed environmental violations. EPA and DOJ testified that the immunity provisions in S. 582 would allow a company to escape prosecution even for criminal conduct merely by confessing and belatedly taking corrective action.

a. Could you please respond to these concerns? What are the safeguards in the privilege that are in, or should be in, S. 582 that will ensure bad actors and criminal activity are not protected?

b. How have your states dealt with this problem? Specifically, how did you craft your legislation to make sure safeguards were in place?

c. How do your states take care of situations where you have an environmental emergency—can the regulator come in with cease and desist orders or some other type of relief to enforce the law?

Answer 2. In any environmental audit law passed by Congress, measures should be included in the Act to ensure that individuals or businesses use the information learned from the self-audit to come into compliance with the environmental laws, and not to avoid compliance responsibilities. In S. 582, the privilege is waived if the individual or business does not come into compliance the environmental laws identified in the audit within a reasonable period of time, or if the privilege is being asserted for a fraudulent purpose. Certain information should be expressly excluded from the privilege under the Act: information required to be developed, maintained or reported by any environmental law, information required to available or furnished pursuant to any environmental law, information obtained by a regulatory agency through observation, sampling, or monitoring, information obtained through independent sources, documents prepared prior or subsequent to, independent of the voluntary self-evaluation, and any information not otherwise privileged, that is developed or maintained in course of regularly conducted business activity or practice. To the extent that S. 582 is not clear in its inclusion or exclusion of these items, it should be amended to clarify matters.

Colorado has enacted a statute that sets out incentives for regulated industries to perform self-audits and to disclose violations found in those evaluations. Specifically, the statute allows an evidentiary and testimonial privilege for self-audits that are followed by prompt correction of any environmental violations found. Further, the law allows immunity from certain civil and criminal penalties for violations reported and corrected.

The EPA makes assertions about privileges and immunities laws that are not well-founded. In Section III of its Voluntary Environmental Policy and Self-Disclosure Policy Statement, for example, EPA asserts that privileges and immunities statutes can shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities. The EPA provides no basis for making these assertions. In fact, they cannot provide such a basis.

A well-drafted law will not allow a business to shield criminal misconduct. For example, Colorado's law would not allow disclosure immunity for a party who has had a series of violations in the past. Further, a privilege would not be allowed for an audit done for a fraudulent purpose. S. 582 should provide similar protection to the Colorado law.

Question 3. EPA and other opponents to S. 582 claim that the proposed bill encourages litigation because it does not adequately define what falls within the scope of an audit. In order to evade disclosure, violators could argue that many routine business activities are "compliance evaluations." Further, they claim that the "reasonable efforts" standard to correct environmental violations is unclear, and that the "compelling circumstances" the government would have to determine to overcome the privilege in a criminal investigation are also vague.

a. How would you respond to these criticisms? Also, how would delineate the parameters of the term voluntary environmental self-evaluations"?

b. Could this privilege actually increase litigation because parties will argue about the limits of what is and what is not protected? What has been the experience in your state?

c. Does the audit privilege in S. 582, as currently drafted, protect the factual data as well as legal conclusions? Doesn't this restrict access to important evidence including testimonial evidence, that would determine whether a violation has occurred or whether a potential environmental disaster might be possible?

d. Opponents of the bill claim that S. 582 would provide penalty immunity even where violations result in serious harm or imminent and substantial endangerment, thus undercutting the primary purpose of federally delegated programs to protect health and the environment. Do you agree with this criticism? Do you believe that this depreviation of penalty authority would limit a state's leverage in negotiating an appropriate remedy for any damage that may have been caused or injunctive relief that may be necessary?

Answer 3. While there may be a need for initial judicial clarification of terms and provisions in privileges and immunities laws, there is no reason to believe that litigation costs will increase because of such laws in the long-term. To the contrary, we believe, and a U.S. Senate resolution has found, that these statutes will result in more violations being corrected with less administrative and judicial cost.

Under Colorado law, "voluntary [environmental] self-evaluation" means a self-initiated assessment, audit, or review, not otherwise expressly required by environmental law, that is performed by any person or entity, for itself, either by an employee or employees employed by such person or entity who are assigned the responsibility of performing such assessment, audit, or review or by a consultant engaged by such person or entity expressly and specifically for the purpose of performing such assessment, audit, or review to determine whether such person or entity is in compliance with environmental laws. Once initiated, such voluntary self-evaluation shall be completed within a reasonable period of time. Nothing in this section shall be construed to authorize uninterrupted voluntary self-evaluations.

This is the context in which we view the term "voluntary [environmental] self-evaluation."

Colorado's privileges and immunities law has been successful in bringing companies together with our Department of Health to solve problems. Approximately fifteen companies have come forward to disclose violations of the environmental laws. These violations have ranged from permit exceedences to unpermitted discharges of pollution. Many of these violations would not have been discovered by enforcement personnel. More important, these are violations that have been or are being corrected. To the extent that S. 582 is not clear in its inclusion or exclusion of these items, it should be amended to clarify matters.

Under Colorado law, an environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure, unless:

(a) The entity or person for whom the environmental audit report was prepared, whether the environmental audit report was prepared by the entity or by a consultant hired by the entity, waives the privilege under this section;

(b)(I) A court of record or an administrative law judge, after an in camera review, determines that:

(A) The environmental audit report shows evidence that the person or entity for which the environmental audit report was prepared is not or was not in compliance with an environmental law; and

(B) The person or entity did not initiate appropriate efforts to achieve compliance with the environmental law or complete any necessary permit application promptly after the noncompliance with the environmental law was discovered and, as a result, the person or entity did not or will not achieve compliance with the environmental law or complete the necessary permit application within a reasonable amount of time.

(c) If the evidence shows noncompliance by a person or entity with more than one environmental law, the person or entity may demonstrate that appropriate efforts to achieve compliance were or are being taken by instituting a comprehensive program that establishes a phased schedule of actions to be taken to bring the person or entity into compliance with all of such environmental laws.

(d) A court of records and administrative law judge after an in camera review determines that compelling circumstances exist that make it necessary to admit the environmental audit report into evidence or that make it necessary to subject the environmental audit report to discovery procedures;

(e) A court of record or an administrative law judge after an in camera review, determines that the privilege is being asserted for a fraudulent purpose or that the

environmental audit report was prepared to avoid disclosure of information in an investigative administrative, or judicial proceeding that was underway, that was imminent, or for which the entity or person had been provided written notification that an investigation into a specific violation had been initiated; or

(f) A court of record or an administrative law judge after an in camera review, determines that the information contained in the environmental audit report demonstrates a clear, present, and impending danger to the public health or the environment in areas outside of the facility property.

These protections are more than sufficient to rebut the criticisms leveled against the privilege and immunity provisions. To the extent that S. 582 is not clear in its inclusion or exclusion of these items, it should be amended to clarify matters.

Question 4. According to S. 582, the protection for audit reports would only apply when a federal court has determined that identified instances of non-compliance have been promptly corrected and where the protection was not sought for fraudulent purposes.

a. Will qualified audit protection legislation prevent the government from obtaining crucial data about a company's non-compliance?

b. Do you agree with EPA's criticism of S. 582 that the bill allows regulated entities to dictate their own pace in correcting violations because it only calls for corrective action or elimination of a violation by the exercise of "reasonable diligence"? EPA also has claimed that compliance might be slower than would be in the best interests of protecting public health and the environment. What is your response? Additionally, doesn't waiting for correction of the violation present a problem? Is it clear that the problem would have to be corrected in order for the privilege to apply?

c. Could you elaborate on why the privilege/immunity as provided in S. 582 is preferable to EPA's policy of penalty mitigation in terms of promoting company self-evaluations and compliance with environmental regulations?

Answer 4. The qualified audit protection legislation will not prevent the government from obtaining crucial data about a company's non-compliance. S. 582 does not restrict the power of any governmental agency to investigate violations of the law. To the extent any limitations exists at all, S. 582 merely allows small businesses that go beyond the investigation and reporting requirements under existing law to protect themselves from penalties, if they fix the problem they discover.

The point that EPA continuously overlooks is that in all of the cases to which S. 582 would apply, the environmental problems would not have been discovered by a small business that merely complies with the law and regulations. Under current federal law, ignorance is rewarded while good faith compliance efforts create risks of punishment. Congress should enact a law like S. 582, which is designed to encourage small businesses to find out whether they are in compliance and to take compliance steps sooner rather than later. The use of the term "reasonable diligence" acknowledges that a "one size fits all" approach is inappropriate for the variety of circumstances that may be faced. Clearly, the business availing itself of the protections provided in S. 582 will have the burden of establishing that it has acted with reasonable diligence. To the extent that S. 582 is not clear that the protections apply only when the problem has been corrected, it should be amended to so specify.

The EPA final policy is not an adequate substitute for federal legislation. While we applaud the agency's extensive efforts to gain public and state input into its policy, and its sincere efforts to enact a policy that provides incentives for self-evaluation, the policy is just that—a policy. In the end, it is a guidance document only which, by its own admission, "does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties." In short, the final policy provides no certainty that enforcement action will not be taken.

In addition to the uncertainty for business caused by the lack of federal privilege and immunity provisions, there is great uncertainty for state delegated and authorized programs. The EPA has made it clear that it will scrutinize delegated programs in states with privileges and immunities laws to determine whether those states have the necessary enforcement authorities to maintain those programs.

RESPONSES FROM PATRICIA S. BANGERT TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than in its absence?

Answer 1. Yes. The President's National Performance Review acknowledged that there are numerous examples where the failure of EPA to devise better ways to protect the environment affordably may result in just the opposite of the intended effect. Colorado's environmental audit law is based on the assumption that business

will respond positively to the incentives offered. In the long run, we expect that environmental compliance will improve. This is especially true for small businesses. For example, those that are newly covered by recent Clean Air Act amendments face a daunting choice. On the one hand, they may wish to comply with the law and undertake an audit to determine how their practices must be changed to reach compliance. On the other hand, it may be a more logical business decision to blissfully ignore environmental responsibilities, hope that regulators will be too busy to notice their small enterprise, and come into compliance only when forced. They may fear that they are already violating environmental laws, but are afraid to discover the truth.

Question 2. Would any of you like to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing and fighting over technicalities and unhelpful questions of interpretation?

Answer 2. Colorado's privileges and immunities law has been successful in bringing companies together with our Department of Health to solve problems. Approximately fifteen companies have come forward to disclose violations of the environmental laws. We would expect even more success if a federal privileges and immunities law, like S. 582; were enacted.

Question 3. As the Chairman of the Antitrust, Business Rights and Competition Subcommittee, I am interested in each of our views on whether it is desirable to attempt to protect competition by imposing fines based on any "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to addressed, or would the cure be worse than the problem?

Answer 3. The theory behind economic benefit penalties is to recapture the economic value that a facility receives from delaying compliance with environmental regulation. EPA's stated goal in assessing economic benefit penalties is to negate a company's incentive to avoid compliance.

The goal of negating an economic incentive to avoid compliance is not relevant in cases of voluntary disclosure. Small businesses that perform voluntary self-evaluations and then disclose their audits have clearly made a commitment to achieve compliance regardless of the cost. In performing the audit, the small business incurs significant cost to identify areas of noncompliance. By voluntarily disclosing instances of non-compliance, it is stepping forward to work with regulators and, in doing so, is committing itself to funding what can be a very expensive effort to correct deficiencies.

It is important to remember that S. 582 requires a company to discover non-compliance through an environmental audit. The entity cannot have known about the violation and then voluntarily disclosed the non-compliance. Since the company cannot have prior knowledge of its non-compliance, and was therefore unaware of any potential economic benefit, the punitive rationale regarding such penalties is not applicable to a voluntary disclosure under this type of legislation.

Tossing a company making a good faith effort to cooperate and achieve compliance into the quagmire of economic benefit calculations defeats the whole purpose of this type of legislation. It turns a new and innovative process that is intended to focus on environmental quality into contentious negotiations, that, based on past experience, could drag on for a year or more. This creates the very uncertainty that discourages companies from conducting voluntary self-evaluations and voluntarily disclosing the results.

Question 4. This question was directed to Mr. Johnson.

RESPONSE FROM PATRICIA S. BANGERT TO QUESTION OF UNIDENTIFIED SENATOR

Question. Does the Colorado law provide immunity for criminally negligent acts which are later disclosed and corrected by a company?

Answer. The Colorado law does not allow immunity for information that a business was required to provide under existing laws. To the extent that there is no existing obligation to investigate or report, information generated by a self-evaluation would be protected, unless there is a finding that the business is a repeat offender or "bad actor."

RESPONSES FROM THE U.S. ENVIRONMENTAL PROTECTION AGENCY TO QUESTIONS FROM SENATOR KOHL

Question 1. The EPA has recently implemented a new policy to provide incentives for environmental audits. However, the agency indicates that "[t]he policy is not a final agency action and is intended as guidance. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties." 60 Fed. Reg. 66712 (Dec. 22, 1995). Some companies believe that this means that the EPA can and will disregard the policy at will. Please explain why the EPA opted to use a policy rather than fully commit to a rule.

Answer 1. EPA has specifically left open the issue of whether to convert its self-disclosure policy into a rulemaking. The Policy itself states, "While EPA is taking steps to ensure consistency and predictability and believes that [the Policy] will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate." This issue was discussed at length during the stakeholder focus group dialogues utilized by EPA to develop the Policy.

EPA is aware of the desire on the part of the regulated community for greater enforcement certainty, and we are applying the self-disclosure policy consistently by establishing a steering committee to review significant issues and develop and publish answers to questions about the policy's application. EPA has established a Quick Response Team (QRT) which is charged with making nationally consistent, fair and expeditious decisions concerning the application of the Policy. The QRT meets weekly to review nationally significant issues and develop guidance interpreting the Policy. EPA is also tracking cases and publicizing decisions made under the Policy. EPA intends to apply the Policy on every occasion in which the Policy conditions are met. Finally, the self-disclosure policy states that within three years EPA will conduct a study on the Policy's effectiveness, and the Agency expects to consider enforcement certainty issues then.

Question 2. To what extent is this new policy binding on regional EPA offices, and how do you assure uniformity of applications?

Answer 2. EPA is uniformly applying the self-disclosure policy across all EPA enforcement programs and Regions. The Agency has established a Quick Response Team (QRT) which is charged with making nationally consistent, fair and expeditious decisions concerning the applicability of the Policy. The QRT meets weekly to review nationally significant issues and develop guidance interpreting the Policy. EPA is also tracking cases and publicizing decisions made under the Policy. The Agency intends to apply the Policy on every occasion in which the Policy conditions are met.

Question 3. The new policy requires that companies report any violations within ten days. Some companies have complained that this is too short a period. In your experience, have most companies been able to comply with this requirement or offer a reasonable grounds for waiver of strict enforcement of the 10 day deadline?

Answer 3. Yes, most companies have been able to disclose violations under the Policy within ten days after they have discovered that a violation has or may have occurred. Companies have the opportunity to disclose that a violation "may have occurred" where the company has some doubt about the existence of a violation. Where reporting within ten days is not practical because the violation is complex and compliance cannot be determined within that period, the Agency may accept later disclosures if the circumstances do not present a serious threat and the company meets the burden of showing that the additional time was needed to determine compliance status.

Question 4. In his written testimony, Tom Gehl from the Kohler Company makes a good point. He said: "a responsible regulated entity that audits should not be in a position of greater potential liability than an entity that does not audit." He also says that the EPA policy fails because it does not "protect information provided to EPA from disclosure to other government agencies or third-parties." How do you respond to his criticism?

Answer 4. EPA agrees that responsible companies that audit should not be in a position of greater potential liability than companies that do not audit, so long as violations are promptly disclosed and promptly corrected. The 1995 Price Waterhouse survey clearly demonstrates that auditing is widespread and growing because the industry already believes that auditing reduces liability both for third party actions and enforcement actions. *See* Repsonses to Question 25 of survey. The Agency's self-disclosure policy provides further comfort by eliminating gravity-based penalties and the threat of criminal prosecution for companies that promptly disclose and promptly correct violations and meet the other reasonable safeguards of the Policy. With the Agency's policy in place, responsible companies have no reason to hide from their government.

With respect to citizen suits, companies that promptly disclose and correct violations pursuant to the terms of the self-disclosure policy are highly unlikely targets for citizen suits, many of which are limited to addressing on-going violations. Moreover, most environmental statutes preempt citizen suits where there is "diligent prosecution" of violations. With respect to toxic tort suits, the type of evidence that should be available to tort plaintiffs relates to issues beyond the jurisdiction of EPA. Generally, however, during 18 months of public hearings, industry has presented little evidence of abuse by government or third parties regarding the use of self-evaluative materials, so EPA is unpersuaded that an evidentiary privilege is needed in any context.

RESPONSES FROM THE U.S. ENVIRONMENTAL PROTECTION AGENCY TO QUESTIONS FROM SENATOR THURMOND

Question 1. Mr. Herman, you repeatedly indicate in your written testimony that the Chemical Manufacturers Association praised and supports the new EPA policy. Are you aware that the Chemical Manufacturers Association believes significant changes are needed in the EPA policy, and in fact supports legislation such as we are considering at this hearing?

Answer 1. EPA's testimony did not state that the Chemical Manufacturers Association (CMA) "supported" EPA's policy. Rather, we noted that EPA's Policy "has won praise from the Chemical Manufacturers Association", among others. In a statement dated December 22, 1995, David F. Zoll, Vice President and General Counsel of the Chemical Manufacturers Association, wrote:

"CMA commends the Agency for issuing this policy, as it represents a substantial, positive development in the Agency's views on the subject. We also salute the Agency for instituting the open, 19-month process that gave rise to the new policy * * * By its new policy, EPA recognizes the increasing importance of companies' own efforts in assuring compliance. EPA has also committed itself to treating companies that find, fix and disclose noncompliance more favorably than those that do not. We believe the new policy will substantially promote the use of environmental auditing and compliance management systems. It should also lead to greater willingness to disclose noncompliance discovered through these activities. The result will be greater environmental protection through the prevention of noncompliance, as well as greater public awareness of regulated entities' compliance status and efforts."

Question 2. Do any of you care to respond to the view that EPA and the Justice Department are being unduly paternalistic in dealing with the States that have passed legislation encouraging voluntary audits? For example, the Texas environmental agency apparently believes that the Texas legislation has helped compliance efforts and is making the environment in Texas cleaner, but that the EPA is making it more difficult for the Texas agency to do its job.

Answer 2. EPA does not believe that it is being "unduly paternalistic" towards States that have passed audit privilege and/or penalty immunity statutes. Under federal law, EPA must evaluate the enforcement authority of any given State before a federal program can be administered by a State. When that enforcement authority is inadequate, federal law prohibits the state from administering such programs. This helps ensure a "level playing field" for regulated entities nationwide.

The Agency on April 5th of this year issued guidance which explains and summarizes our obligations under the Clean Air Act to evaluate certain State enforcement authorities prior to approving a Title V program. Federal law requires, for example, that States have authority to recover penalties for criminal and civil violations of federal requirements. We have attached a copy of that guidance for your information.

The State of Texas has enacted an audit privilege and penalty immunity law, and also has applied for approval to administer a Clean Air Act Title V program. The Clean Air Act clearly requires us to determine whether the Texas audit law prevents that State from having adequate enforcement authority to administer a Title V program. We are working closely with the State in reviewing these federal requirements and the Texas law.

EPA has made no secret of its opposition to State audit privilege and penalty immunity laws. We believe that, contrary to some stated views, the evidence shows that such laws are not needed to encourage environmental auditing. Even if they offer companies some marginal incentives to audit, however, the harm that they cause to enforcement programs far exceeds their positive effects. The Agency has worked closely with States to promote constructive alternatives that promote voluntary compliance without compromising enforcement.

Question 3. Mr. Herman, should we not believe companies when they state that existing law and EPA policy currently deter them from conducting voluntary audits? In particular, what is the basis for your written statement that companies are not discouraged by the limitations in the EPA policy?

Answer 3. Apparently, current law and EPA policy do not deter businesses from conducting voluntary audits. In fact, the opposite is true. Surveys conducted by Price Waterhouse, Arthur Andersen, and the Investor Responsibility Research Center indicate that 75–85% of businesses have compliance audit programs. In the 1995 Price Waterhouse survey, 96% of businesses that audit do so in order to discover and correct environmental violations before Agency inspectors find them. Moreover, approximately 90% of companies that audit do so for sound business reasons. *See* Responses to Question 25 in survey. Finally, companies that do not audit are not primarily concerned about confidentiality. *See* Responses to Question 21 in survey. EPA has already agreed to provide additional incentives by reducing penalties for companies that audit, disclose and correct violations. So far, the Agency has received disclosures from over 65 companies, and has reached 15 settlements in which 12 companies received penalty waivers from EPA.

Question 4. Mr. Herman, you state that under the EPA policy companies should have nothing to hide from the "government." What is your response to company concerns about creating documents that may be used against the company by third parties in private litigation? Can you offer any comfort there?

Answer 4. Responsible companies have no reason to hide from their government, if they promptly disclose and correct violations and meet the other reasonable safeguards in the self-disclosure policy. With respect to citizen suits, companies that promptly disclose and correct violations pursuant to the terms of the self-disclosure policy are highly unlikely targets for citizen suits, many of which are limited to addressing ongoing violations. Moreover, most environmental statutes preempt citizen suits where there is "diligent prosecution" of violations. With respect to toxic tort suits, the type of evidence that should be available to tort plaintiffs relates to issues beyond the jurisdiction of EPA. Generally, however, during 18 months of public hearings, industry has presented little evidence of abuse by government or third parties regarding the use of self-evaluative materials, so EPA is unpersuaded that an evidentiary privilege is needed in any context.

Question 5. (See the Department of Justice's response to this question.)

RESPONSES FROM THE U.S. ENVIRONMENTAL PROTECTION AGENCY TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Several environmental statutes, like the Clean Air Act, allow states to take the lead in the enforcement of environmental laws through the development of state programs satisfying federal minimum standards. However, some states which have enacted or are considering legislation dealing with an environmental audit privilege or disclosure immunity, have reportedly been pressured by EPA to reject such policies or have final approval of their programs withheld or withdrawn. In fact, an April 5, 1996, EPA memo establishing criteria for Title V approvals states that where a state privilege or immunity law deprives the state of adequate enforcement authority, "it must be amended before final Title V approval can be granted." This is the case regardless of the success and benefits the privilege may have produced at the state level.

Question 1a. Shouldn't states be able to enact and administer their own environmental audit protection and voluntary disclosure legislation that they believe protects the public and environmental without federal prosecution of companies who want to take advantage of such protections? Shouldn't states rights be recognized and why?

Answer 1a. EPA encourages States to experiment with new ways of improving compliance with their environmental laws, and has consulted closely with States in developing its own policies. This freedom to experiment, however, is subject to those minimum standards established under federal law, which make clear that States must have adequate authority to enforce the requirements of federal programs which they administer. As noted above in answer to a question from Senator Thurmond, EPA is required by most federal statutes to ensure that States have adequate enforcement authority before the Agency can delegate programs to those States. For example, Section 502(b)(5) of the Clean Air Act requires States to have specific authority to enforce the terms and conditions of Title V Permits, including the ability to recover civil penalties of at least $10,000 per day and to recover "appropriate" penalties for criminal conduct. EPA's April 5, 1996, guidance for the Clean Air Act Title V permit program, a copy of which is attached, explains more fully the mini-

mum enforcement authorities which Congress has said States must have been EPA can approve their Title V programs.

Question 1b. How have you dealt (or how do you plan on dealing) with situations where a company has attempted to withhold information under a state privilege?

Answer 1b. Neither EPA nor the Department of Justice believe that audit privileges as established under State law apply in federal enforcement actions. Allowing States to establish a myriad of different evidentiary rules for federal cases would be a radical departure from current practice.

Question 1c. In what respects is adoption of the privilege and/or immunity protections under state law incompatible with current EPA and DOJ enforcement policy?

Answer 1c. With respect to State environmental audit privileges, such protections are incompatible with current EPA enforcement policy to the extent that they can deprive the government of information that may be crucial to prosecuting a case successfully, and also may hamstring undercover investigations. With respect to penalty immunities, some State laws provide penalty immunity for violations which do not qualify for penalty mitigation under EPA's self-disclosure policy.

Question 2. EPA criticizes state audit privilege and/or immunity legislation and S. 582 affecting the ability to enforce environmental laws in criminal and emergency situations. Yet, witnesses testified at the hearing that states still retain the ability to enforce their environmental programs through emergency orders and injunctive relief and that they are fully able to carry out their criminal enforcement authority.

Question 2a. Has EPA made any determinations with respect to the impact of individual state statutes on Title V enforcement or the enforcement of other environmental statutes? Has EPA determined that any state has adopted particularly egregious laws which would undermine the state's ability to enforce its programs?

Answer 2a. EPA decisions on whether to approve delegation of Clean Air Act Title V permit programs are pending in Idaho, Texas and Michigan, all of which have audit privilege and penalty immunity laws. EPA has concerns about the effect on the State's enforcement powers of the audit privilege/penalty immunity laws in these States, and may exercise in one or more of them the option of granting interim approval but requiring changes before final Title V approval is granted. The Title V delegation process allows the Agency to grant interim approval to a State program, with final approval conditioned upon changes to legislation or the issuance of reasonable legal interpretations from the state attorney general demonstrating that the State has the required authority.

Question 2b. Please provide the basis of your opinion that S. 582 offers immunity to repeat violators. Since the bill states that the privilege is not afforded when disclosure is made by an entity that "has been found by a Federal or State court to have committed repeated violations of Federal or State laws, or orders on consent, related to environmental quality due to separate and distinct events giving rise to the violations, during the 3-year period prior to the date of the disclosure", doesn't this cure your problem (*See* Section 2(a) of S. 582)

Answer 2b. The "repeated violations" exception requires a finding of a past repeated violation by a court. This seems to suppose that either the defendant has fought several prior enforcement actions all the way to adverse judgment, or that the United States would be expected in a prosecution for one claim to prove a series of prior violations by the defendant or to forego evidence material to the claim actually filed. This supposition ignores the fact that most environmental matters are resolved in settlement, typically without any admission of liability.

Because the "repeated violations" exception in S. 582 is so narrow in practical effect and the fact that limited resources do not allow the government to pursue every violator to judgment for every violation, it is unlikely that the government will be able to make the showing required by S. 582, regardless of the gravity of the violation that initially caused the government to bring the action.

By contrast, EPA's policy on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" requires that:

"The specific violation (or closely related violation) has not occurred previously within the past three years at the same facility, or is not part of a pattern of federal, state or local violations by the facility's parent organization (if any), which have occurred within the past five years. For the purposes of this section, a violation is:

(a) any violation of federal, state or local environmental law identified in a judicial or administrative order, consent agreement or order, complaint, or notice of violation, conviction or plea agreement; or

(b) any act or omission for which the regulated entity has previously received penalty mitigation from EPA or a state or local agency."

Question 3. One of the criticisms that EPA and DOJ have about the bill is that evidence will be buried under the privilege and that the government will not be able to effectively prosecute cases.

Answers 3a–3d. (See the Department of Justice's response to this question.)

Question 3e. What is the basis of your belief that S. 582 allows companies to keep an economic benefit from noncompliance where that economic benefit is substantial and deliberately obtained? According to the bill, only audits conducted for the express purpose of determining whether the entity is in compliance with federal law are covered by the privilege. Doesn't deliberate noncompliance suggest that an audit was conducted in bad faith or for fraudulent purposes and disqualify such an audit from the privilege, thereby addressing your concerns?

Answer 3e. S. 582 has two components: evidentiary audit privilege and penalty immunity. Under the penalty immunity component, where violations are "voluntarily disclosed" under the bill, the entity making the disclosure "shall be immune from any administrative, civil, or criminal penalty * * *." Thus, companies that make "voluntary disclosures" would not be assessed any penalties no matter how egregious the violation and no matter how much the company gained economically from its noncompliance.

Question 4. Industry proponents have stated that the EPA Final Policy is just that, "just a policy" that can be changed at any time and that it has no force of law. They argue that since EPA's guidance is not law, EPA's regions are not bound by the conditions of the policy and, further, under the policy companies do not have any enforceable rights. What is your response to these statements?

Answer 4. EPA is uniformly applying the Audit Policy across all EPA enforcement programs and Regions. EPA has established a Quick Response Team (QRT) which is charged with making nationally consistent, fair and expeditious decisions concerning the applicability of the Policy. The QRT meets weekly to review nationally significant issues and develop guidance interpreting the Policy. EPA is also tracking cases and publicizing decisions made under the Policy. EPA intends to apply the Policy on every occasion in which the Policy conditions are met.

Question 5. In its written testimony, DOJ states that the statute is "hopelessly flawed." However, I think we all believe that the evidentiary privilege and the parameters of disclosure immunity in S. 582 need to be further defined and more specifically delineated. Additionally, I'm sure you know that the purpose of the bill is not to interfere with law enforcement, conceal information, or reward violators of the law—rather the goal is to encourage companies to proactively look for environmental problems and then promptly fix them.

Answers 5a and b. (See the Department of Justice's response to this question.)

RESPONSES FROM THE U.S. ENVIRONMENTAL PROTECTION AGENCY TO QUESTIONS FROM SENATOR FEINGOLD

Question 1. Why did EPA choose to issue its guidelines on environmental auditing as a policy, rather than as a regulation? Has the agency ruled out the possibility of issuing the policy as a regulation?

Answer 1. EPA has specifically left open the issue of whether to convert its self-disclosure policy into a rulemaking. The Policy itself states, "While EPA is taking steps to ensure consistency and predictability and believes that [the Policy] will be successful, the Agency will consider this issue and will provide notice if it determines that a rulemaking is appropriate." This issue was discussed at length during the stakeholder focus group dialogues utilized by EPA to develop the Policy.

EPA is aware of the desire on the part of the regulated community for greater enforcement certainty, and we are applying the self-disclosure policy consistently by establishing a steering committee to review significant issues and develop and publish answers to questions about the policy's application. EPA has established a Quick Response Team (QRT) which is charged with making nationally consistent, fair and expeditious decisions concerning the applicability of the Policy. The QRT meets weekly to review nationally significant issues and develop guidance interpreting the Policy. EPA is also tracking cases and publicizing decisions made under the Policy. EPA intends to apply the Policy on every occasion in which the Policy conditions are met. Finally, the self-disclosure policy states that within three years EPA will conduct a study on the Policy's effectiveness, and the Agency expects to consider enforcement of certain issues then.

Question 2. You testified that EPA is opposed to the privilege provisions of this bill. Would the agency support expanding the exceptions to privilege section contained in the bill to include: gross negligence, negligence, and reckless conduct, and use of audit information to impeach witnesses?

Answer 2. Privilege itself creates obstacles to effective and fair enforcement regardless of the exceptions which will certainly lead to more litigation in every case. The costs of any new privilege dwarf the benefits which the proponents have failed

to establish as an effective incentive. In fact, a Price-Waterhouse survey of industry in April of 1995 found that privilege was less important than penalty mitigation and that among those companies that do not already audit, confidentiality ranked among their least concerns.

Question 3. Does EPA believe that S. 582 which provides privilege and immunity for voluntary audits conducted by "governments" preempts state run compliance assistance programs, such as Wisconsin's? Does the EPA provide similar compliance assistance?

Answer 3. Because the bill does not clearly exempt state programs which contain more stringent requirements, it could conceivably preempt certain state programs. For example, if the State program does not recognize a privilege, or provides less extensive penalty immunity, S. 582 would preempt that program. Witnesses at the May 21st hearing testified that establishing a uniform standard was a primary benefit of S. 582.

EPA funds several sector-oriented Compliance Assistance Centers in partnership with industry, academic institutions, environmental groups and other federal and state agencies. The Agency also has a program of extensive grants to States under several laws. For example, under the Pollution Prevention Act, EPA provides grants for programs which often have compliance assistance components, and under Section 507 of the Clean Air Act, the Agency funds compliance assistance centers specifically for small businesses. Finally, under its Policy on Compliance Incentives for Small Businesses, EPA provides substantial penalty mitigation for businesses who seek assistance from compliance assistance centers and promptly correct violations.

RESPONSES FROM THOMAS P. GEHL. TO QUESTIONS FROM SENATOR GRASSLEY

In your testimony, you state that privilege/immunity legislation for environmental audits encourages companies to comply with environmental laws.

Question 1a. Have your companies taken advantage of either the final policy criteria or a state environmental audit privilege? If so, what has been your experience with the policy or privilege, favorable or unfavorable?

Answer 1a. One company has indicated that they utilized their state's environmental audit privilege which sets forth requirements for claiming the privilege and contains conditions which trigger the loss of the privilege. This company indicated that the privilege has allowed them to write more detailed and frank audit findings with the expectation that they are for internal eyes only. This company indicates that adding the federal protection would give more complete assurance that reports would not be used against them. They also indicate that since the passage of the legislation more site self-audits as well as corporate audits have been conducted.

Another company was faced with a situation in which a private litigant requested copies of an environmental audit report in connection with a citizens' suite brought in a state tribunal in Illinois. The company relied on both attorney-client privilege and Illinois's audit privilege, and was successful. Had the suite been brought in federal court, audit privilege would not have been available under federal law, and EPA's policy would not have applied. Reliance on the attorney-client privilege means, however, that the audits may be used only for the limited purpose of providing management legal advice concerning the compliance status of the facility in question. This company indicates that this restriction severely limits both the use to which audit information can be put, and the extent to which that information can be communicated internally. Accordingly, the effectiveness of internal policing efforts is also hampered.

Another company indicated that although they had not had an occasion to take advantage of EPA's Final Policy criteria or a state environmental audit privilege, because the state has not yet passed such legislation they did, however have had an occasion to disclose information to the Agency which revealed inadvertent noncompliance with certain manufacturing limitations imposed by a relevant Federal environmental law. This information was discovered while the Company was conducting a self-assessment of its own chemically specific management programs pursuant to conducting a self-assessment of its own chemically specific management programs pursuant to certain Federal regulatory requirements. Disclosure was made and it was timely. After the disclosure was made, the "required" enforcement component of the matter was administered under the Agency's applicable Penalty Policy, and a monetary penalty was assessed based on that policy. In addition, the Company was prohibited from using the existing inventory of the chemical involved in the noncompliance until more could be manufactured under proper Agency approvals. Other requirements and operational limitations were imposed.

This company stated that the experience of discovering noncompliance, investigating its cause and implementing time corrective measures, along with discussing these matters—as well as the like consequences of such a violation and voluntary disclosure—with Senior Management, is never a "favorable" experience. But in spite of the fact that no environmental harm occurred (nor was any reasonably possible), that absolutely no economic benefit was obtained, that the violation was entirely inadvertent and unintentional, that all allowable "reductions" or discounts in the base penalty amount were properly permitted according to the Penalty Policy and that the Agency's personnel were sincere, helpful and cooperative in reaching resolution, the payment of significant penalty as well as the substantial costs associated with the business and operational disruption, as well as significant outside legal expenses, is not a sufficient outside legal expenses, is not a sufficient positive incentive for members of the regulated community to come forward to voluntarily disclose. This uncertainty * * * and fear * * * still exists in the Agency's Final Policy because of the discretionary nature of the determining whether or not the disclosure is eligible for the protection under the Policy. Legislation would provide certainty, and certainty provides an incentive to all who would consider voluntary disclosure. The lack of certainty, the possibility of substantial penalties, the likelihood of business interruption and of additional, related costs may be sufficient to prevent disclosure. * * * again particularly when one considers the discretionary application of EPA's Final Policy.

Question 1b. Do you agree with EPA's criticism of S. 582 that the bill allows regulated entities to dictate their own pace in correcting violations because it only calls for corrective action or elimination of a violation by the exercise of "reasonable diligence?" EPA also has claimed that compliance might be slower than would be in the best interests of protecting public health and the environment. What is your response? Doesn't waiting for correction of the violation present a problem? Is it clear that the problem would have to be corrected in order for the privilege to apply?

Answer 1b. One company has responded that they do not believe that companies will take a lax approach to fixing problems found in audits. They add that under their state's privilege law, evidence of noncompliance must be addressed "promptly" and with "reasonable diligence." Because a facility has 90 days to apply for a permit if it discovers it needs one, this company has used the 90 day period as a guide to what would equate to "reasonable diligence." Of course, this company adds, the fact may dictate a longer period if for example, equipment must be designed or ordered. This company adds that federal legislation can easily include such direction for remedying problems found.

Another company states that they do not agree with EPA's criticism in this regard, because most companies would want to ensure that issues are addressed with guidance from the appropriate state or federal agency anyway. This company adds that it is frequently the case that response lags in obtaining approvals from such agencies are the primary cause of any delays in initiating or completing cleanups, once a decision has been made to address the issue.

Another company indicates that "Reasonable diligence," unlike the Agency's assertion, does not permit regulated entities to correct violations at their own, slower pace. Rather it requires the entity to correct the violations pursuant to the time constraints and with appropriate dedication of resources that reasonable parties would agree are, in fact reasonable considering the specific facts of the violation. In addition, the determination of that which is "reasonable" is not a unilateral determination. The likelihood of a regulated party coming forward to make disclosure about a matter not yet corrected. * * * knowing that a hearing will take place, in camera, to determine if the corrective actions were pursued with "reasonable diligence" and, further, knowing that the burden of proving a prima facie case that appropriate efforts to achieve compliance were promptly initiated and pursued with "reasonable diligence" is, from a practical point of view, remote. It is much more likely that entities that intend to take advantage of the benefits of voluntary disclosure will make the required corrective efforts with all deliberate speed and diligence in order to assure, as best they can, that the benefits of the privilege and of voluntary disclosure are made available.

A violation that has not been the subject of timely corrective actions will not permit the disclosure to be characterized as "voluntary" (therefore subject to immunity) and likewise, will not permit the claim of privilege to be upheld after in camera hearing. Disclosing entities don't usually leave such matters to chance.

However, this company added, that there may be violations that cannot be corrected quickly because of their technical complexity or because they require participation of approvals from the Agency or the State. In this situation, the regulated party should be able to voluntarily disclose, agree to the necessary compliance schedule to insure environmental protection is maintained and still be eligible for

the benefits of self disclosure in spite of the incomplete nature of the correction actions rather than wait until correction is complete in order to invoke the privilege or to make a voluntary disclosure. Clearly, appropriate efforts to achieve compliance should be promptly initiated and pursued with reasonable diligence—and those efforts to achieve compliance and complete correction surely must continue after disclosure, likewise, the noncompliance must have been disclosed within a reasonable period of time after its discovery. But there is not a justifiable reason for disqualifying one from receiving the benefits of such a voluntary disclosure simply because appropriate correction could not be achieved prior to disclosure.

Question 2. EPA and others claim that the privilege as proposed in S. 582 would eliminate all punishment for certain criminal and other violations that are voluntarily disclosed regardless of harm, basically giving blanket immunity to companies which have committed environmental violations. The Environmental Protection Agency (EPA) and the Department of Justice (DOJ) testified that the immunity provision of S. 582 would allow a company to escape prosecution even for criminal conduct merely because the company confessed and belatedly took corrective action. Could you please respond to those concerns? What are the safeguards in the privilege as proposed in S. 582 that ensure that bad actors and criminal activity are not protected?

Answer 2. Intentional, willful, or purposeful environmental violations or knowing endangerment offenses should not be subject to protection under the privilege nor under the voluntary disclosure provisions. Bad actors must be punished. Enforcement in these circumstances is appropriate and necessary. Neither companies nor individuals should escape punishment for intentional violations of the law. Immunity should be reserved for the unintentional violations, those committed through inadvertence or perhaps even negligence, but not for intentional acts. S. 582 should be clarified, if necessary, that intentional, willful and purposeful environmental violations or knowing endangerment offenses should not be subject to protection under the privilege or the voluntary disclosure provisions.

Question 3a. EPA and others also claim that the proposed bill encourages litigation because it does not adequately define what falls within the scope of the audit. In order to evade disclosure, violators could argue that many routine business activities are "compliance evaluations." Further, they claim that the "reasonable efforts" standard to correct environmental violations is unclear, and that the "compelling circumstances" the government would have to determine to overcome the privilege in a criminal investigation are also vague. How would you respond to those criticisms? Also, how would you delineate the parameters of the term "voluntary environmental self-evaluation?"

Answer 3a. In order to eliminate the possibility of continuing disagreements with regard to what is and is not within the definition of an audit, there needs to be a clearer definition of what falls within the scope of an audit, including what falls within the scope of a comprehensive environmental compliance management system. Many state privilege laws have defined the report by spelling out the purpose of the audit exercise and what is included under the scope of the report. We would welcome the opportunity to work with the Subcommittee to craft such a definition.

Question 3b. Could this privilege actually increase litigation because parties will argue about the limits of what is and what is not protected?

Answer 3b. Recognizing that there is always litigation over any new law or regulation, if the audit report is well defined, litigation over what is protected should be minimized. There is no reason to believe that this legislation will generate any more litigation or discussion about what is properly within the privilege than litigation that is currently flowing from existing privileges. In fact, a strong argument can be made that litigation will not be increased but decreased because the privilege and immunity will encourage cooperative efforts between the regulators and regulated entities.

Question 3c. Does the audit privilege in S. 582, as currently drafted, protect factual data as well as legal conclusions? Doesn't this restrict access to important evidence, including testimonial evidence, that would determine whether a violation has occurred or whether a potential environmental disaster might be possible?

Answer 3c. No, access to important evidence, including testimonial evidence, would not be restricted. Data that is otherwise required to be reported to the government is specifically excluded. As with other privileges, underlying factual data is not protected. The privilege in S. 582 only protects additional information and legal conclusions that are generated as part of the audit documentation process. The Agency is always free to require the disclosure of pre-existing data, data generated outside the protection of the audit, or information and data that it generates by observation, sampling and monitoring. The Agency always has access to the facts.

Question 3d. Opponents of the bill claim that S. 582 would provide penalty immunity even where violations result in serious harm or imminent and substantial endangerment, thus undercutting the primary purpose of federally delegated programs to protect public health and the environment. Do you agree with this criticism? Do you believe that this deprivation of penalty authority would limit a state's leverage in negotiating an appropriate remedy for any damage that may have been caused or injunctive relief that may be necessary?

Answer 3d. No, we do not agree with this criticism. The privilege only applies to violations that are discovered during routine audits conducted in the context of "self-policing" efforts. The net result is that the problems would be discovered, reported and addressed much more quickly than if the problem is hidden or undiscovered. The result of the privilege would be to encourage more disclosure and address environmental problems more quickly. In such a situation, the privilege would only apply if a court reviews the audit and determines that appropriate efforts to achieve compliance were promptly initiated and pursued. This is especially important in situations where there is a potential for imminent and substantial endangerment. Moreover, CEEC believes that the government should retain the authority to seek appropriate injunctive relief in specific situations.

RESPONSES FROM THOMAS P. GEHL TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than in its absence?

Answer 1. Yes, we believe that your view is an appropriate and a refreshingly insightful way of viewing the policy justifications for this type of legislation. Not only will such legislation allow the Agency to utilize its limited resources more effectively, but it can also be a major step forward in the reinvention of environmental regulation. Our nation's focus should be on improved environmental performance and protection, not on an increased number of enforcement cases. This legislation can help re-direct our country's environmental focus toward a healthier and cleaner environment by enlisting and providing incentives to regulated entities to "find it and fix it" rather than an Agency policy that advocates enforcement policies based purely on the number of cases pursued through enforcement mechanisms. The focus should be on whether this legislation moves us closer to compliance. Regulators should be hard pressed to oppose legislation that moves this nation toward cost-effective, voluntary and positive environmental policies.

Question 2. Would any of you care to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing an fighting over technicalities and unhelpful questions of interpretations?

Answer 2. We believe the entire purpose of S. 582 is to address the objective that you have just described. The voluntary reporting that will occur because of this legislation will bring many issues before environmental regulators that would not have been surfaced otherwise. Each report to the Agency will present opportunities for both sides to learn how to do things that are better for our environment. We recognize that there will always be lingering questions of interpretation and approach but we believe that removing an "Enforcement First" mindset will provide more cooperation, and ultimately, a more environmentally beneficial relationship between the regulated community and their regulators.

Question 3. As the Chairman of the Antitrust, Business Rights, and Competition Subcommittee, I am interested in each of your views on whether it is desirable to attempt to protect competition by imposing fines based on any "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to be addressed, or would the cure be worse than the problem?

Answer 3. Companies that will utilize this legislation are companies that recognize a responsibility to correct the harm or the violation that is discovered. The cost of that correction is not one to be ignored. By recouping a perceived economic benefit appears to be so fraught with difficulty and potential inequity that it may simply act as a disincentive to "find it-fix it" * * * or as you have suggested, the cure could be worse than the problem. In addition, economic benefit arguments are sometimes used as a negotiating tool by governmental organizations. In reality, the companies that have instituted auditing programs have found many benefits beyond the cost and are not focused on punishment for competitors—particularly if other companies are finding problems through the audit process.

RESPONSES FROM THOMAS P. GEHL TO QUESTIONS FROM SENATOR KOHL

Question 1. In January of this year, the EPA instituted its own policy to encourage audits. Under its program, if you conduct an audit, disclose a violation, and correct it, the agency will not assess a penalty. Have you used the EPA procedure yet? If so, how often, and what has been the result? If not, why not?

Answer 1. CEEC participated actively during the time that EPA developed its policy statement. Our organization filed extensive comments, which are attached, before the policy was issued and submitted a letter, that is attached, to Assistant Administrator Steve Herman following the issuance of the enforcement policy. CEEC's members do not, for reasons outlined in the letter to Mr. Herman, believe that the EPA policy is adequate. A number of CEEC companies indicate that they have not yet utilized the EPA policy for a number of reasons. More than the one company has expressed concern over the fact that, because it is a discretionary policy, EPA can decide to use it or not use it depending on their own determination. One company indicated that they have not used the procedure yet, at least in part for fear that other agencies and/or private litigant, not subject to the policy, would attempt to obtain the results of such internal self-policing and use the information obtained against the company. Another company indicated concerns over the use of the policy because they have historically voluntarily disclosed information to regulators and then subjected to substantial enforcement penalties.

Question 2. You are concerned that the audits that you undertake in good faith will be used against you. That's understandable. After all, you spend your time and invest your good will in trying to comply with the law, and then someone can come along and make you pay for trying to do the right thing. Has the EPA ever asked you or a company that belongs to your Council for an environmental audit as part of a fishing expedition on their part to find violations?

Answer 2. Most of our companies have not been asked by EPA to produce their environmental audit reports as part of a "fishing expedition." But one CEEC company indicated, "I have personally sat in numerous meetings, however, and have heard DOJ civil and criminal enforcement attorneys, EPA criminal enforcement attorneys, and state attorney's general proclaim with substantial bravado that they will not hesitate to request copies of the audit if they know one exists in an ongoing enforcement matter." Another company indicated that a private litigant did seek an audit from this company, as part of what they believed was a fishing expedition. This company added that the news of this event has had a substantial chilling effect on the willingness of other companies to conduct audits.

Question 3. If you are given immunity under federal law for voluntarily conducting an audit, reporting a violation and correcting the problem, please explain why you would also need the privilege?

Answer 3. The privilege is essential to protect companies from others such as citizen suits or tort claim discovery requests seeking the audit reports. Without the privilege the audit process will be chilled.

Question 4. Do you believe you need immunity from criminal prosecutions for the statute to be effective?

Answer 4. Intentional, willful, or purposeful environmental violations or knowing endangerment offenses should not be subject to protection under the privilege nor under the voluntary disclosure provisions. Bad actors must be punished. Enforcement in these circumstances is appropriate and necessary. Neither companies nor individuals should escape punishment for intentional violations of the law. Immunity should be reserved for the unintentional violations, those committed through inadvertence or perhaps even negligence, but not for intentional acts. S. 582 should be clarified, if necessary, that intentional, willful and purposeful environmental violations or knowing endangerment offenses should not be subject to protection under the privilege or the voluntary disclosure provisions.

RESPONSES FROM VICTOR JOHNSON, III TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. In your testimony you give the prosecution's view of the concept of environmental audit privilege.

Question 1a. Could you elaborate on how the environmental audit privilege restricts a prosecutor's ability to obtain evidence in criminal investigations and compromise enforcement? Isn't an *in camera* hearing an adequate method of determining the privilege?

Answer 1a. In any criminal case the intent or knowledge of the actors is determinative of criminal culpability. In "white collar" crimes, as in environmental offenses, the overt criminal act may only implicate the immediate actors and not reveal the business decisions and practices that fueled the act. Who made decisions

and how they were executed are important factors in determining if conduct is truly criminal and worthy of prosecution. Thus the corporate records can be extremely valuable in reconstructing historical events leading to the overt act.

If a privilege were extended to environmental audit records, a "worst case" scenario can easily be envisioned. At this time, corporate counsel seek to protect audit records under the guise of attorney-client privilege or as litigation work product. With the advent of a self-audit privilege, clever corporate counsel would add this as a third "layer" of protection. They would also require that all records and documents pertaining to environmental actions, decisions and compliance be incorporated into the "audit." To gain access to these records, or to even challenge their inclusion in the audit, would require lengthy court proceedings, assuming that a court of competent jurisdiction could be determined.

An *in camera* proceeding, in a criminal case, has several draw backs from the perspective of a local prosecutor. First, jurisdiction by the criminal court normally attaches only after criminal charges have been filed. If the prosecutor needs the audit to determine if criminal conduct has occurred, he would have either to try to get a search warrant or subpoena for the documents and then face the *in camera* review and subsequent appellate challenges. This would be costly for most communities and the time pending final appeals would lead to further difficulties in preserving evidence; meeting speedy trial and statute of limitations requirements; and protecting the community from additional harm. Moreover, to be successful in an *in camera* review, the prosecutor must already have sufficient evidence of criminality to get beyond the privilege.

The claim of privilege may be so broad that these problems extend to every communication conceivable, oral and written, between the polluter, their employees, agents, and associates. If this is the effect, then investigation can never proceed to the point where the process is anything but an endless string of *in camera* hearings resulting in nothing but enriching defense lawyers and frustrating public health and safety policy.

In our system of criminal justice, the prosecutor has been given great discretion in determining who, how, when, and even, if someone should be charged with a criminal offense. Daily I must make decisions that effect the liberty of individuals and sometimes must even consider whether some defendants ought to face the ultimate penalty. If this legislation were to restrict my discretion in the area of environmental crimes, then Congress is deciding that corporate executives are entitled to special protections not available to the average citizen.

Question 1b. How does the bill's audit privilege make investigations of criminal behavior more difficult, interfere with routine enforcement actions, or compromise the public's right to know, if S. 582 expressly excludes from the privilege information "required to be collected, developed, maintained, or reported to a regulatory agency"; "obtained by observation, sampling, or monitoring by any regulatory agency"; or "obtained from a source independent of the environmental audit"? (See section 2(a) of S. 582) Don't these exemptions from the privilege allow a prosecutor to have the same access to information that it has today?

Answer 1b. The empirical data required by these types of reports, assuming they are accurate, would be important evidence but as discussed in 1a, would not indicate the pattern of decision making, supervision or negligence that discloses the true character of the violation. Criminal investigations do not routinely rely on regulatory agencies. In fact, many regulators do not perceive enforcement their primary mission and either pursue other, sometimes incompatible remedies, or even frustrate others from discovering the violator at all. At the most innocent level, many regulators do not know when an act is a possible criminal violation and do not refer them to the appropriate agency. Administrative law does not require the burden of proof needed for a criminal prosecution. While most administrative hearings can result in findings if the evidence shows a preponderance in favor of one party (meaning more likely than not), the criminal prosecution demands proof beyond a reasonable doubt, a degree of certainty which is dependent on an entirely different approach to investigation. A reasonable doubt can be anything which makes a person hesitate to convict, even if they believe guilt has been proven. To rely on regulators, trained minimally if at all, to present criminal cases would weaken substantially any real effort to obtain convictions for environmental crime violations.

Question 1c. Have you personally run into problems where facts, documents or communications were shielded under this privilege/immunity while you were prosecuting a case, or do you know of any cases where this has happened? How was this situation dealt with?

Answer 1c. Fortunately Tennessee has seen fit not to adopt such a wide ranging statute. Efforts in this state to pass an environmental self-audit privilege have

stalled in large part because of concern over the mischief this protection could have in criminal enforcement.

While I have not encountered interference in the environmental area, I have had the investigation into abuse at a mental health institution scuttled by a reporter's privilege not to cooperate as a witness.

The attached article from the Denver Post (April 21, 1996) outlines the shortcomings of this legislation as experienced by a state with such a law.

Question 1d. What specific provisions in S. 582 are problematic and why? Please provide a summary of the current provisions of S. 582 that you continue to oppose and/or have concerns about. How do you suggest these provisions need to be tailored to conform with EPA/DOJ enforcement criteria?

Answer 1d. As indicated in my original testimony, the National Association of District Attorneys opposes the criminal privilege and criminal immunities that this legislation would provide. To the extent that the bill seeks to create a criminal privilege and immunity, such language should be removed. Our association stands ready to assist in crafting legislation that will assist industry in dealing with governmental regulation while not unduly hamstringing law enforcement.

RESPONSES FROM VICTOR JOHNSON, III TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than in its absence?

Answer 1. Yes. Responsible companies will do the self-audits both as a matter of good corporate citizenship and as a sound business practice, with or without this legislation. Cost effectiveness, compliance requirements and safety issues will be and are addressed by our good business citizens through internal evaluations.

Consideration of this legislation in the criminal context must recognize the shield it creates for the unscrupulous polluters and the mechanism it establishes to aid in the skirting of the law until government action is feared or initiated. Any evaluation of this proposal must address the question of continued damage to the environment during the "grace" periods allowed and how this impacts a prosecutor's ability to act decisively to protect the public interest.

Question 2. Would any of you care to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing and fighting over technicalities and unhelpful questions of interpretation?

Answer 2. A polluter who wants to work cooperatively can and will do so presently. New EPA guidelines coincide with policies already in effect in prosecutor's offices. Unfortunately, this legislation will create and encourage protracted arguments over technicalities that do not currently exist in the area of criminal enforcement. If the goals of this legislation are to encourage compliance and ameliorate regulatory sanctions, they should be addressed clearly without complicating the legislation with privileges and immunities that will only interfere with the efforts of law enforcement.

Question 3. As the Chairman of the Antitrust, Business Rights, and Competition Subcommittee, I am interested in each of your views on whether it is desirable to attempt to protect competition by imposing fines based on any "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to be addressed, or would the cure be worse than the problem?

Answer 3. The important issue in this discussion is whether or not the noncompliance was intentional and meant to create an unfair advantage. An "intentional" failure to comply is a purposeful violation of the law, and it would be reasonable to expect that any punishment imposed would seek to remove or reclaim an unjustified and illegally obtained economic benefit. On the other hand, an "unintentional" noncompliance that is discovered, reported and corrected, under EPA's current guidelines, would not be referred for criminal prosecution. Consequently, a company that unintentionally failed to comply would not be subjected to criminal penalties in the first place. I am not aware of a prosecuting attorney that would want to indict and prosecute a case of obviously unintentional non-compliance. I am also not familiar with any such cases that have been prosecuted. This legislation attempts to develop a elaborate protection against an imagined attack.

Question 4. Mr. Johnson, could you explain whether you think companies are deterred from conducting voluntary environmental audits based on the current state of the law? If so, would there not be benefits from legislation such as this?

Answer 4. I do not think responsible companies are deterred from conducting voluntary environmental audits because of fear of possible criminal prosecution. As a matter of fact, I am not aware of any company that has been prosecuted criminally as the result of self-disclosed violations that were promptly and cooperatively corrected. This legislation responds to a "fear" that industry has expressed and not an actual problem, Insofar as criminal prosecution is concerned, this is unnecessary legislation which will only impede criminal investigations, encourage wasteful and dilatory litigation and disserve the public.

RESPONSES FROM JERRY RICHARTZ TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. In your testimony, you state that privilege/immunity legislation for environmental audits encourages companies to comply with environmental laws.

Question 1a. Have your companies taken advantage of either the final policy criteria or a state environmental audit privilege? If so, what has been your experience with the policy or privilege, favorable or unfavorable?

Answer 1a. Our companies conduct modified audits, called an "Environmental Priorities Program", at our facilities. These are conducted under Attorney-Client privileged information as well as the state environmental audit privilege in Oregon and Colorado. In the state of California, where there is no state privilege, the program is protected by attorney-client privilege information.

Our experience has been that we have not found a condition where we would have had to use the privilege. However, with the privilege, we have a greater degree of confidence that if we find a problem, we would be able to allocate funds to solve the problem rather than spend a potentially larger amount in litigating the final outcome. In my opinion, therefore, the privilege allows for a more favorable outcome. In my opinion, therefore, the privilege allows for a more favorable outcome.

Question 1b. Do you agree with EPA'S criticism of S.582 that the bill allows regulated entities to dictate their own pace in correcting violations because it only calls for corrective action or elimination of a violation by the exercise of "reasonable diligence"? EPA also has claimed that compliance might be slower than would be in the best interests of protecting public health and the environment. What is your response?Doesn't waiting for correction of the violation present a problem? Is it clear that the problem would have to be corrected in order for the privilege to apply?

Answer 1b. First, S. 582 does not allow regulated entities to dictate their own pace in correcting violations. Section 3801(c)(1) of S. 582 requires the regulated entity to demonstrate "that appropriate efforts to achieve compliance were promptly initiated and pursued with reasonable diligence" (emphasis added) The proposed legislation clearly requires a prompt response. Once initiated, compliance must be achieved with reasonable diligence. For some violations, this may require a lot of time, e.g., to gain approval from the Environmental Protection Agency ("EPA" or "the Agency") for a permit under the Clean Air Act, the Clean Water Act, or the Resource Conservation Recovery Act. For other violations (e.g., a simple paperwork violation), the regulated entity may only need a few days to file amended documents. Either way, the Agency will always have latitude within its enforcement discretion to assess whether or not a regulated entity has pursued compliance with reasonable diligence. Moreover, Senator Brown specifically invited both EPA and the Department of Justice ("DOJ") to help the Subcommittee improve S. 582. Given this invitation by Senator Brown, EPA should support what they characterized at the hearing as "the laudable intentions of (the bill's)— sponsors." EPA should assist the Subcommittee by offering well reasoned improvements to S. 582 rather than criticisms which could forestall its enactment.

Second, compliance will not be slower S. 582 than necessary to protect public health and the environment. A compliance response that compromises public health and the environment would not be "appropriate." Section 3801(c)(1) of S. 582 does not protect compliance that is not "appropriate." Therefore, the audit report would not be protected. Again, the Agency should work with the Subcommittee to improve the bill if, in the Agency's opinion, this issue needs to be clarified.

Third, waiting for the correction of an environmental violation may, at times, present a problem. In those instances, waiting would not be "appropriate." Under S. 582, Section 3801(c)(1) requires prompt initiation of an "appropriate" response. Where waiting to correct a problem is not reasonable or appropriate, the standard established in Section 3801(c)(1) of S. 582 would not be met. Therefore, the audit report would not be protected.

Fourth and finally, S. 582 clearly states that a problem would have to be corrected in order for the privilege to apply. Otherwise, the regulated entity would not have taken the necessary "appropriate efforts to achieve compliance." The Agency should

work with the Subcommittee if the EPA feels this provision of S. 582 could be clarified.

Question 2. EPA and others claim that the privilege as proposed in S. 582 would eliminate all punishment for certain criminal and other violations that are voluntarily disclosed regardless of harm, basically giving blanket immunity to companies which have committed environmental violations. EPA and DOJ testified that the immunity provision in S. 582 would allow a company to escape prosecution even for criminal conduct merely because the company confessed and belatedly took corrective action. Could you please respond to these concerns? What are the safeguards in the privilege as proposed in S. 582 that ensure bad actors and criminal activity are not protected?

Answer 2. As indicated by their statements at the Subcommittee hearing, the concerns raised by EPA and DOJ regarding the immunity provision in S. 582 are not valid, given the objectives of Senators Brown and Hatfield. These concerns would have to be addressed as a condition of immunity for a voluntary disclosure under Sections 3803 and 3804 of the pending legislation. However, as a I indicated in my written testimony, S. 582 should make it crystal clear that intentional and willful violations of environmental laws do not qualify for civil or criminal immunity. Both Senators Hatfield and Brown indicated they are receptive to such a suggestion. EPA and DOJ should work with the Subcommittee to improve this aspect of the bill.

In addition, the privilege as proposed in S. 582 has a number of safeguards to ensure that bad actors and criminal activity are not protected. These safe guards can be found in S. 582 under the following sections:

Section 3801(a)(1) requires that the audit be "prepared in good faith."

Section 3801(a)(3)(C) requires that the protection afforded by S. 582 not apply if the person claims the protection for a fraudulent purpose.

Section 3801(a)(3)(B) requires that the protection afforded by S. 582 not apply if the appropriate Federal court determines that (i) the environmental audit report provides evidence of noncompliance with a covered Federal law; and (ii) appropriate efforts to achieve compliance were not promptly initiated and pursued with reasonable diligence.

Section 3801(a)(2) requires that the protection afforded by S. 582 not apply to any document, communication, data, report, or other information required to be collected, developed, maintained or reported to a regulatory agency pursuant to a covered Federal law.

Section 3803(a)(2) requires the voluntary disclosure be made promptly after the person that initiates the audit receives knowledge of the disclosed information.

Section 3803(a)(3) requires the person that initiates the audit to address the issues identified in the voluntary disclosure within a reasonable period of time after receiving knowledge of the information and within a period of time that is adequate to achieve compliance with the requirements of the federal law.

Section 3803(a)(4) requires that as a result of the disclosure the regulated entity must provide any further relevant information requested by the appropriate Agency official.

Section 3803(b) makes the benefits for voluntary disclosure conditional, so a person committing repeat violations (as found by a federal or state court) will not qualify for the benefits of a voluntary disclosure.

Question 3. EPA and others also claim that the proposed bill encourages litigation because it does not adequately define what falls within the scope of an audit. In order to evade disclosure, violators could argue that many routine business activities are "compliance evaluations." Further, they claim that the "reasonable efforts" standard to correct environmental violations is unclear, and that the "compelling circumstances" the governments would have to determine to overcome the privilege in a criminal investigation are also vague.

Question 3a. How would you respond to these criticisms? Also, how would you delineate the parameters of the term "voluntary environmental self-evaluation"?

Answer 3a. While EPA and others may claim S. 582 will encourage litigation, the experience in the seventeen states with environmental audit laws does not support this claim. The state enforcement agencies have not reported that people are trying to claim the protection of the state laws for routine business activities. In sharp contrast, the representative from Texas at the Subcommittee hearing indicated the Texas environmental audit law encourages a "getting-on-to-solutions" attitude where legal posturing is not necessary. Perhaps the net effect will be less litigation. The real-life experience in Texas would appear to suggest such an outcome.

As to whether the terms "reasonable efforts" or "compelling circumstances" are unclear or vague in S. 582, they are not relevant because S. 582 does not use these terms. However, if any of the terms used in S. 582 are unclear or vague, I would respectfully submit that EPA and DOJ accept the invitation from Senators Hatfield

and Brown to become familiar with the proposed legislation and help improve the bill.

As an example of a possible need for further clarification, you have asked how I would delineate the parameters of the term "voluntary environmental self evaluation." Again, I have not been able to find the term "voluntary environmental self evaluation" in S. 582. Therefore, I am unclear why the parameters for this term should be delineated. In the alternative, allow me to emphasize that the parameters of the related terms "environmental audit" and "environmental audit report" are delineated in Sections 3804 (2) and (3) of the bill. If these terms need further clarification or delineation, a simple survey of the statues in the seventeen states with environmental audit laws will provide many examples to meet this goal.

Question 3b. Could this privilege actually increase litigation because parties will argue about the limits of what is and what is not protected?

Answer 3b. The privilege in S. 582 probably will not increase litigation over what is, or what is not protected. To date, the sixteen states with environmental audit laws providing privilege are the best source of information on this issue. So far, none of the sixteen states with privilege for environmental audit reports have reported any problems with increased litigation over this issue. Apparently the problem is only speculative and the real-life results in the states do not support the speculation.

Question 3c. Does the audit privilege in S. 582, as currently drafted, protect factual data as well as legal conclusions? Doesn't this restrict access to important evidence, that would determine whether a violation has occurred or whether a potential environmental disaster might be possible?

Answer 3c. As currently drafted, Section 3801(a)(2) of S. 582 does not protect any document, communication, data report, or other information required to be collected, developed, maintained, or reported to a regulatory agency pursuant to a covered federal law. The protection only applies to information a company voluntarily collects and develops. Therefore, S. 582 does not restrict access to any important evidence that is required to be reported.

In addition, S. 582 provides a company with strong incentives to voluntarily detect, correct, and disclose information that is not required to be reported by law. By encouraging companies to generate this information, S. 582 actually encourages disclosure of additional information that may avert the possibility of an unintended, potential environmental disaster. As a result, more and better information is disclosed. This increase in the quality and quantity of disclosed information helps companies improve their compliance and in doing so, protects the environment.

Question 3d. Opponents of the bill claim that S. 582 would provide penalty immunity even where violations result in a serious harm or imminent and substantial endangerment, thus undercutting the primary purpose of federally delegated programs to protect public health and the environment. Do you agree with this criticism? Do you believe that this deprivation of penalty authority would limit a state's leverage in negotiating an appropriate remedy for any damage that may have been caused or injunctive relief that may be necessary?

Answer 3d. The criticism that S. 582 would provide penalty immunity for violations that result in serious harm or imminent and substantial endangerment contradicts the express intent of Senators Hatfield and Brown in proposing this legislation. To this end, Senators Hatfield and Brown have indicated a desire to improve the bill. Therefore, the "opponents of the bill" should offer constructive suggestions to help clarify how S. 7582 should handle voluntary disclosures of violations that resulted in serious actual harm, or cases of imminent and substantial endangerment.

RESPONSES FROM JERRY RICHARTZ TO QUESTIONS FROM SENATOR KOHL

Question 1. In January of this year, the EPA instituted its own policy to encourage audits. Under its program, if you conduct an audit, disclose a violation, and correct it, the agency will not assess a penalty. Have you used the EPA procedure yet? If so how often, and what has been the result? If not, why not?

Answer 1. At Oregon Steel Mills, Inc. ("Oregon Steel") we have not used the Environmental Protection Agency ("EPA or "the Agency") procedure. The EPA procedure is a statement of policy rather than law, and as such, does not provide us with assurance that a penalty will not be assessed. Because EPA's policy is not law, companies do not have any enforceable rights under the policy. Therefore, EPA's regions are not bound by the conditions of the policy. The authority to bind the regions and provide enforceable rights must come from a rulemaking or legislation. By itself,

EPA's policy cannot eliminate the impediments to improved environmental compliance.

Question 2. You are concerned that the audits you undertake in good faith will be used against you. That's understandable. After all, you spend your time and invest your good will in trying to comply with law, and then someone can come along and make you pay for trying to do right. Has the EPA ever asked you or a company that belongs to your Council for an environmental audit as part of a fishing expedition on their part to find violations?

Answer 2. Oregon Steel has not been asked for an environmental audit as part of a fishing expedition to find violations. Nor do we know of other companies in the Steel Manufacturers Association subject to a fishing expedition. However, in amplification of this issue, we respectfully submit for the Subcommittee's review the attached exerpt from a 1995 Congressional General Accounting Office ("GAO") report on environmental auditing. See Environmental Auditing, A Useful Tool That Can Improve Environmental Performance and Reduce Costs, GAO/RCED–95–37, executive summary attached as Exhibit 4. The GAO report states "environmental auditing is also discouraged by (1) the inconsistent application by some EPA regions of the agency's policy on requests for audit reports and (2) current enforcement policies that provide managers with only vague assurance that taking the initiative to audit for compliance and correct identified deficiencies will by some measure reduce penalties." Id. at 3. This statement in the GAO report suggests that representatives of EPA's regional offices may have previously asked for environmental audit reports as part of fishing expeditions to find violations.

Question 3. If you are given immunity under federal law for voluntarily conducting an audit, reporting a violation and correcting the problem, please explain why you would also need the privilege?

Answer 3. Environmental issues addressed in an environmental audit are not always clear violations of environmental regulations that can be voluntarily detected, corrected, and disclosed. The increasingly complex environmental regulations often present unclear regulatory issues where honest disagreements can occur. In addition, these issues may pale in comparison to other high priority environmental issues a company may face. At Oregon Steel, we would prefer to conduct the audit in good faith, having a full internal airing of the issues, and then spend our time and money trying to address the top priority environmental issues. In these instances, we would not want the environmental audit report to be used against us when someone comes along and tries to make us pay because we tried to do the right thing.

In addition, sixteen states have environmental audit protection statutes. These states were referred to in the Subcommittee hearing as "the laboratory of democracy." However, the experiments in these state laboratories have been handicapped by threats from EPA and the Department of Justice ("DOJ"). Federal legislation is needed to remove the handicap and accommodate the environmental audit protection laws in these states.

Question 4. Do you believe that you need immunity from criminal prosecution for the statute to be effective?

Answer 4. Yes. Through the development of case law precedent, the standards for criminal violations under environmental laws have become lower and lower. Subsequently, the risk has increased for an individual to be charged with alleged criminal violations of environmental laws. This risk increases if immunity for other penalties is provided under the statute, but immunity for criminal penalties is not. In some situations, the Agency could face a choice of pursuing criminal charges against an individual environmental manager or dropping the charges against a company entirely. Such a situation and the possible outcome "chills" the desire of an environmental manager to conduct an environmental audit. Including immunity from criminal prosecution in the bill removes this disincentive. However, the bill should not provide immunity for intentional and willful criminal conduct. As I indicated in my written testimony, I recommend that S. 582 make it clear that intentional and willful violations of environmental laws do not qualify for civil or criminal immunity. Therefore, the statute would be most effective and encourage more thorough auditing if it includes immunity from criminal prosecution for a good faith voluntary disclosure, but does not provide immunity for intentional and willful violations.

RESPONSES FROM JERRY RICHARTZ TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than its absence?

Answer 1. Absolutely. The intent of S. 582 is to help companies voluntarily self-police and self-disclose so violations can be avoided or corrected, thus resulting in a healthier and cleaner environment. Some of the state programs are already seeing these benefits. For example, the representative from Texas at the Subcommittee hearing reported that many of the self-reported violations under the Texas statute "would not have been detected in a routine compliance inspection." Therefore, the Texas statute has increased self-policing and enabled better environmental compliance, resulting in a healthier and cleaner environment.

Question 2. Would any of you care to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing and fighting over technicalities and unhelpful questions of interpretation?

Answer 2. The representative from Texas at the Subcommittee hearing identified the "getting-on-to-solutions" attitude accompanying each disclosure as "perhaps the most import change in the enforcement dynamic" as a result of the Texas audit law. He indicated, "the violation is not disputed. No legal posturing is necessary." Negotiations begin at a point that is otherwise too often delayed in traditional enforcement processes. As a result, the environment benefits. The federal enforcement agencies should experience a similar change in the enforcement dynamic.

Question 3. As the Chairman of the Antitrust, Business Rights, and Competition Subcommittee, I am interested in each of your views on whether it is desirable to attempt to protect competition by imposing fines based on "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to be addressed, or would the cure be worse than the problem?

Answer 3. While I cannot speak for all companies on this issue, Oregon Steel does not think a company should garner an economic benefit as a result of non-compliance. However, I could imagine a situation where the economic benefit is so small (or so clearly not intentionally sought) that perhaps the agency could use its enforcement discretion to waive the economic benefit part of a penalty.

Of course, this does not mean that we necessarily agree in every case with the way the EPA calculates the economic benefit. For example, a recent case called *In re Harmon Electronics* has been reported in environmental periodicals. It is my understanding that in this case, EPA originally calculated the economic benefit to be approximately $1 million. On appeal, and based on a more realistic calculation, the economic benefit was determined to be only about $6 thousand. That is a big difference. It is therefore easy to understand that in a case like *In re Harmon Electronics,* the "cure could be worse than the problem."

United States General Accounting Office EXHIBIT 4

GAO

Report to the Ranking Minority Member, Committee on Governmental Affairs, U.S. Senate

April 1995

ENVIRONMENTAL AUDITING

A Useful Tool That Can Improve Environmental Performance and Reduce Costs

GAO/RCED-95-37

GAO

United States
General Accounting Office
Washington, D.C. 20548

Resources, Community, and
Economic Development Division

B-258657

April 3, 1995

The Honorable John Glenn
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

Dear Senator Glenn:

As requested, we are reporting on the potential for federal agencies to improve their environmental performance and reduce costs by conducting environmental audits. This report (1) describes the experience of organizations that are leaders in environmental auditing and identifies the characteristics that distinguish their programs, (2) discusses the extent to which federal agencies use environmental auditing and the benefits that could accrue from its wider use, and (3) identifies obstacles and disincentives to the more effective use of environmental auditing by these agencies.

As arranged with your office, unless you publicly announce its contents earlier, we will make no further distribution of this report until 30 days after the date of this letter. At that time, we will send copies to the appropriate congressional committees and to the Administrator of the Environmental Protection Agency. We will also make copies available to others on request.

Please contact me at (202) 512-6111 if you or your staff have any questions. Major contributors to this report are listed in appendix VII.

Sincerely yours,

Peter F. Guerrero
Director, Environmental
Protection Issues

Executive Summary

Purpose

As the estimated costs of cleaning up contamination on federal lands rise to hundreds of billions of dollars, environmental auditing is increasingly viewed as a way to foster better environmental practices in operating federal facilities. Environmental audits are comprehensive and systematic reviews of environmental performance used to improve compliance with environmental laws and minimize future environmental damage and cleanup costs.

The Ranking Minority Member of the Senate Committee on Governmental Affairs asked GAO to examine the potential for increasing the use of environmental auditing in the management of federal agencies' operations. Specifically, he requested that GAO (1) examine the experience of organizations that are leaders in environmental auditing and identify the characteristics that distinguish their programs, (2) determine the extent to which federal agencies use environmental auditing and the benefits that could accrue from its wider use, and (3) identify obstacles and disincentives to the more effective use of environmental auditing by these agencies.

Background

During a typical environmental audit, a team of qualified inspectors, either employees of the organization being audited or contractor personnel, conducts a comprehensive examination of a plant or other facility to determine whether it is complying with environmental laws and regulations. Using checklists and audit protocols and relying on professional judgment and evaluations of site-specific conditions, the team systematically verifies compliance with applicable requirements. The team may also evaluate the effectiveness of systems in place to manage compliance and assess the environmental risks associated with the facility's operations.

No laws currently require environmental auditing. Environmental auditing has been—and remains—largely a voluntary activity. Companies and public agencies that have adopted the practice have done so for sound business reasons. The adoption of environmental auditing by these organizations represents a management decision to seek compliance proactively, instead of simply reacting to crises. The Environmental Protection Agency's (EPA) 1986 policy on environmental auditing encouraged federal agencies subject to environmental laws to adopt environmental auditing to achieve and maintain compliance. The agency also acknowledged its own responsibility to provide technical assistance to help federal agencies design and initiate audit programs.

Results in Brief

Effective environmental audit programs have a number of characteristics in common, according to studies GAO reviewed. First and foremost, the programs have the strong support of their organization's management, stemming from top management's explicit commitment to compliance with environmental requirements. They also receive resources adequate to hire and train audit personnel, to perform audits of appropriate scope and frequency, and to promptly fix problems identified through the audit process. In addition, effective audit programs operate with freedom from internal or external pressure and employ quality assurance procedures to ensure the audits' accuracy and thoroughness. Private and public sector organizations that have effective environmental auditing have reported benefits that include, in addition to improved compliance, reduced exposure to civil and criminal liability, cost savings from operating efficiencies and avoided cleanups, and reduced environmental hazards.

Even though environmental liabilities are widespread throughout the federal sector, most agencies—aside from the Department of Energy (DOE) and the Department of Defense (DOD)—do little or no environmental auditing. GAO's review of two civilian agencies with significant environmental liabilities, the Department of the Interior's (DOI) Bureau of Land Management (BLM) and the Department of Transportation's (DOT) Federal Aviation Administration (FAA), showed that both agencies have begun to put in place some of the key elements of an environmental audit program. Improvements are still needed, however, to more fully address the agencies' environmental problems. Information from EPA indicates that most other civilian federal agencies are either beginning to develop an environmental audit program or have no program at all.

Obstacles and disincentives impede the further development of environmental auditing in civilian agencies. In particular, senior agency management has yet to make the same strong and explicit commitment to environmental auditing as have the organizations with effective programs. Civilian agencies may have little incentive to support environmental auditing as a means of achieving compliance because EPA and state environmental regulators have performed few, if any, inspections at many civilian agencies. GAO's work at BLM and FAA, along with information from EPA, further indicates that environmental auditing at civilian agencies is hampered because many agencies lack the necessary environmental expertise. Environmental auditing is also discouraged by (1) the inconsistent application by some EPA regions of the agency's policy on requests for audit reports and (2) current enforcement policies that provide managers with only vague assurance that taking the initiative to

audit for compliance and correct identified deficiencies will by some measure reduce penalties.

Principal Findings

Environmental Auditing Is Credited With Significant Benefits

Union Carbide, Allied Signal, and other companies contacted by GAO that previously faced enormous liabilities for pollution indicated that they currently experience fewer fines, cleanup costs, and legal problems—a turnabout they attribute chiefly to environmental auditing. One company official noted that "even the most hardline managers are beginning to recognize [environmental auditing's] value when they are presented with the . . . cost of remediation, permitting, and enforcement actions." DOE and Air Force officials were similarly supportive, citing a number of examples of significant cost savings and other benefits. DOE claimed, for example, that engineering studies at its Savannah River nuclear facility, spurred by an environmental audit, resulted in a decision to consolidate 14 separate water systems at a savings of over $120 million dollars. Air Force engineers estimated, conservatively, that environmental audits save one service command over $4.3 million yearly in fines and penalties, although Air Force lawyers believe the savings to be much higher. Notwithstanding such anecdotal accounts, however, GAO found that systematic and comprehensive data on the savings realized through environmental audits are not available.

Representatives of organizations using environmental auditing emphasized the importance of top management's commitment to a program's success. A formal environmental policy statement is often used by top managers to put employees, shareholders, and others on notice that environmental protection is integral to the organization's mission. In addition, some organizations consider environmental performance in compensation decisions for key personnel. Union Carbide officials, for example, told GAO that a facility manager's pay can be reduced if the facility's environmental performance is rated poorly. They added that the "surest way for a plant manager to be fired is to fail to follow up on an audit's findings by implementing appropriate corrective actions."

Environmental Auditing Among Federal Agencies Is Limited

While DOE and DOD have made significant progress toward developing effective environmental audit programs, many other federal agencies, some with potentially large environmental liabilities, have made more

limited progress. GAO's review of BLM and FAA showed that although these agencies have developed pilot audit programs, they still need to expand these programs and ensure that the programs become permanent. Information from EPA indicates that other federal agencies also have only fledgling audit programs or no programs at all. For example, a 1993 EPA survey of agency environmental officials disclosed that 8 of 19 agencies surveyed have no environmental audit program and that many of the remaining agencies' programs were, at best, rudimentary.

As the private sector's experience has shown, environmental audit programs can increase compliance with environmental laws and help avoid the costs of noncompliance. Furthermore, while the environmental audit programs at BLM and FAA are still under development, their pilot audits have already realized financial and environmental benefits. For example, an audit at FAA's Technical Center in New Jersey revealed that oil left outdoors in open containers for fire extinguisher training was overflowing and contaminating the ground when it rained. The audit manager stated that if the audit had not discovered the oil spillage and simple, low-cost measures had not been taken to correct it, the Center could have had to spend additional dollars investigating the contamination before the actual cleanup could even begin. He added that if the Center's audit program had been implemented in the 1960s, current cleanup costs, estimated at $25 million to $30 million, could have been avoided.

Agencies Face Obstacles in Developing Environmental Audit Programs

While some civilian federal agencies, such as BLM and FAA, have launched pilot environmental audit programs, obstacles impede the further development of environmental auditing in the civilian sector. According to environmental audit experts GAO interviewed, building strong environmental audit programs requires that senior managers take actions such as issuing statements notifying personnel of management's support for the program, providing adequate and reliable funding for the program, personally reviewing audit reports, and ensuring that environmental audit findings are promptly addressed. Senior managers at most civilian agencies have yet to take such steps.

Civilian agency managers may have little incentive to support environmental auditing because, under the current EPA and state inspection strategy, many civilian agencies have little risk of being inspected. BLM and FAA environmental officials explained that relatively few of their agencies' facilities have ever been inspected and that, as a result, agency managers see little need to use environmental auditing to

ensure compliance. EPA data show that a large portion of the civilian facilities inspected by federal and state inspectors in fiscal year 1994 belonged to a few civilian agencies, while few, if any, facilities belonging to other civilian agencies with substantial environmental liabilities were inspected.

Another obstacle to the wider use of environmental auditing by civilian agencies is that many lack the necessary technical expertise. EPA has recently taken steps to address civilian agencies' needs for environmental expertise, but GAO's work at BLM and FAA and information from EPA itself indicate that more sustained and regular technical assistance will be required. In particular, effectively encouraging environmental auditing in civilian agencies will require outreach to senior civilian agency managers on how environmental auditing can improve compliance with environmental laws, reduce exposure to environmental liabilities, and lower costs. Opportunities exist for EPA to deliver the needed technical assistance at low cost through cooperative efforts with experienced agencies, such as DOE and the Air Force, which have already developed environmental audit training programs and have demonstrated a willingness to share them with other agencies.

Another disincentive to environmental auditing results from EPA's treatment of environmental audits in enforcement actions against the sponsoring organization. To avoid discouraging the voluntary adoption of environmental auditing, EPA's 1986 policy statement notes that the agency "will not routinely request audit reports." However, members of the audit community explain that the inconsistent application of this policy by some EPA regional enforcement authorities has had a "chilling effect" that has impeded environmental auditing in both public and private organizations. Environmental officials report that an additional disincentive to auditing is created by EPA policies that encourage environmental auditing and the disclosure of violations but do little to assure regulated entities that such proactive behavior will be rewarded with any relief from penalties.

Recommendations

GAO recommends that the Administrator, EPA, (1) ensure that civilian federal agencies receive a measure of enforcement attention commensurate with the environmental risks posed by their operations, (2) use technical assistance and outreach to civilian federal agencies to improve agency managers' awareness and understanding of the benefits to be gained from environmental auditing, (3) require EPA regional offices to adhere to the agency's stated policy that EPA will not "routinely request"

environmental audit reports but will confine such requests to the exceptional situations outlined in the agency's 1986 policy statement on environmental auditing, (4) revise agency policies to encourage regulated entities to self-discover, report, and correct noncompliance by providing for reductions in the penalties for violations identified through environmental auditing.

Agency Comments

EPA, DOE, DOD/Air Force, and DOT/FAA provided written comments on a draft of this report, which are included in their entirety in appendixes III through VI of this report. EPA agreed generally with GAO's recommendations that it inspect civilian federal agencies and provide technical assistance to those agencies to encourage wider use of environmental auditing, but it questioned whether the report had (1) shown persuasively that there have been significant departures from its stated policy of not requesting copies of audit reports except under limited circumstances and (2) adequately demonstrated the need to change its audit policy to provide more explicit assurance that penalties would be mitigated for violations that were discovered, reported, and corrected as a result of voluntarily conducted audits. Citing the common belief among regulated companies and agencies that these issues do, in fact, discourage the wider use of voluntary environmental audits, GAO still maintains that the recommended actions are needed. EPA's comments and GAO's detailed responses are included in appendix III.

DOE, DOD/Air Force, and DOT/FAA agreed generally with GAO's findings and recommendations. They also provided information to supplement, clarify, and update points discussed in our draft report. Where appropriate, such information has been incorporated in the final report. DOI/BLM reviewed the draft but declined to provide written comments. The DOI Assistant Secretary for Land and Minerals Management stated that BLM would give the report's findings and recommendations careful consideration as the agency proceeds with the development of its environmental audit program.

RESPONSES FROM JOHN A. RILEY TO QUESTIONS FROM SENATOR KOHL

Answer 1. The TNRCC does not track inspections by violation, therefore we cannot provide the exact requested statistics. However, we are providing you with statistics on TNRCC criminal and civil enforcement actions that reflect approximately a one-year period prior to enactment of the environmental audit legislation and a one-year period following enactment of the legislation.

CRIMINAL STATISTICS

3/31/94 through 3/31/95—9 cases, with 9 convictions.
4/01/95 through 3/31/96—8 cases, with 8 convictions.

CIVIL STATISTICS

3/31/94 through 3/32/95—Approximately 600 cases with settled penalties of approximately $5.3 million and funding of Supplemental Environmental Projects in the amount of approximately $900,000.
4/1/95 through 3/31/96—Approximately 600 cases with settled penalties of approximately $5.8 million and funding of Supplemental Environmental Projects in the amount of approximately $325,000.

Answer 2. The TNRCC would not characterize the EPA enforcement policy as inadequate. However, I think the regulated community may be uncomfortable about relying solely on a policy, particularly when EPA is questioning whether state laws which convey similar incentives comply with federal statutory requirements. Furthermore, the EPA policy still may require substantial penalties for self-disclosed violations that may be viewed to have significant historical economic benefit. This may inhibit self-disclosure and auditing sufficiently to limit the effectiveness of the policy in improving the environment. In addition, as the policy confers 75% of the benefits offered for self-disclosure to companies that only discover violations without proactive measures and systems, the marginal benefit in the policy to creating these systems may not be sufficient.

Answer 3. I would respond that enforcement of federal law is not the appropriate focus—compliance with federal law is the important measure. Enforcement for sake of enforcement is meaningless. The TNRCC views the Texas audit law as an additional and very valuable tool in achieving compliance.

RESPONSES FROM JOHN A. RILEY TO QUESTIONS FROM SENATOR THURMOND

Answer 1. Yes, I agree that the proper way to evaluate this audit legislation is to consider whether it would result in a cleaner and healthier environment. Presumably, compliance with applicable laws, rules, and permits will yield these results. Proactive self-policing for violations, disclosure of discovered violations, and expeditious compliance will result in environmental benefits. We feel these laws, with appropriate qualifications as embodied in the Texas statute, are an effective tool in achieving compliance.

Answer 2. As stated in my written testimony, one of the most important changes we have experienced in Texas as a result of our audit law is the "getting-on-to-solutions" attitude that accompanies each self-disclosure. Focusing our resources on solving problems and ensuring compliance is much more beneficial to our environment than long drawn-out disagreements over legal interpretations and technical wording in agency orders. The Texas audit law has provided a shortcut through the legal wrangling, and focuses activity immediately on compliance and remediation.

Answer 3. Your question strikes at two important issues. First, EPA raised concerns as the hearing about whether penalty immunity for the economic benefit of non-compliance over an extended period (I believe the example was 10 or 15 years) would have an inequitable effect on complaint companies. As an enforcement official, my first reaction is that our enforcement programs are not nearly as effective as they should be if a violation continues for over a decade without detection. Additionally, if the enforcement mechanism has been unable to detect the violation, we should encourage the regulated community to self-police these difficult-to-detect violations, report them, and bring their facility into compliance. Second, and answering your question more directly, the choice is whether to focus on disgorging historical economic benefit or to do all you can do to place companies on the same footing now and into the future. Because the environment does not benefit from penalty dollars recovered, but does benefit from discovery and correction of violations, I submit that it is a more appropriate position to bring companies into compliance—and thereby, require an equal economic expenditure—as soon as possible, and continue that "level economic playing field" into the future. I also believe that extended litigation

is the promise of any program that raises the economic benefit issue to the forefront. Economic benefit is a difficult calculation at best and should not have a pre-eminent role in environmental law enforcement.

RESPONSES FROM JOHN A. RILEY TO QUESTIONS FROM SENATOR GRASSLEY

Answer 1a. We have received only one formal indication of EPA's position on audit laws with regard to Title V. This was a memo from Mary Nichols and Steve Herman to Region 10. We have received no formal written notification on the Texas law. We note that Texas is expected to receive interim approval of the Title V program and are soon seeking delegation of the NPDES program. We look forward to hearing EPA's specific concerns about the Texas statute, and are ready to work with them to aid their interpretation of our law and resolve their concerns.

Answer 2a. S. 582 may be amended to exempt certain criminal acts, namely international, knowing, or serious reckless conduct.

Answer 2b. The Texas law provides no immunity for intentional knowing or serious reckless violations, which cover nearly all of our criminal environmental violations. Moreover, and most importantly the privilege may be lost and the immunity may be denied if the holder of the privilege fails to correct a discovered violation.

Answer 2c. The Texas law places no restrictions on the TNRCC's ability to seek injunctive relief. Moreover, because only violations that are discovered through an audit receive immunity, and environmental emergencies are usually obvious and unlikely to be discovered in an audit, the audit legislation will not affect environmental emergencies.

Answer 3a. The language of the bill can be crafted to avoid abuse, much as the language of the Texas statute was. Texas law only protects discovery of violations that result from activities that exceed state or federal requirements.

Answer 3b. Texas has had no litigation experience in the year the legislation has been in effect, and I think that rebuts EPA's argument to some extent. Texas law does not extend privilege or immunity to ongoing "compliance evellluations" only to periodic audits. Moreover, by not defining more clearly what are "reasonable efforts," the Texas law gives incentive to those seeking to retain the privilege and to gain the immunity to make extra efforts so that a finder-of-fact will be convinced that their efforts have indeed been "reasonable."

Answer 3c. S. 582 is open to the interpretation that it protects disclosure of underlying facts. The Texas law specifically does not protect underlying facts and I would recommend that S. 582 be amended to clarify the limits of the privilege conveyed.

Answer 3d. The penalty immunity may be viewed as a limit on leverage but too often penalty becomes the focus of negotiation and environmental solutions are delayed or secondary. It is often the case that the environmental remedies are the most significant aspect in terms of cost to a company. Whatever additional leverage is lost with penalty immunity, is countered by the threat of losing privilege or immunity protection if solutions are not expeditious.

Answer 4a. Qualified audit protection legislation will not prevent the government from obtaining crucial data about non-compiance if the law leaves intact all other enforcement powers. Enforcement premised on voluntarily-created information can only penalize those who create it and the obvious incentive is not to self-evaluate beyond requirements. An enforcement program that is strongly dependent, as EPA contends, on information that only exists voluntarily, necessarily skews enforcement toward those who seem most concerned with compliance and are proactive in identifying their own misdeeds.

Answer 4b. All incentives and protections should be directly dependant on correction. Reasonable diligence is assured if the possibility exists that these protections may be lost by responding too slowly.

Answer 4c. A federal law as opposed to an agency policy, would provide certainty to the regulated community. Moreover, inclusion of the privilege would allow the regulated community to assess their compliance with complete candor, knowing that such candor would not be used against them.

RESPONSES FROM LOIS SCHIFFER AND VERONICA COLEMAN TO QUESTIONS FROM SENATOR THURMOND

The Department of Justice defers to the Environmental Protection Agency for the responses to questions 1–4 from Senator Thurmond.

Question 5. Ms. Coleman and Ms. Schiffer, is the Justice Department precluded from bringing criminal charges, as a practical matter, by EPA assurances that com-

panies will not be subject to "any threat of criminal prosecution" in particular situations? That is, do EPA policies have a binding effect on the Justice Department as a practical matter?

Answer 5. As separate agencies, EPA and DOJ are bound only by their own policies. However, the Department of Justice worked closely with EPA in the development of its "Incentives for Self-Policing" Policy and ensured that it would be consistent with DOJ's current policy entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by Violators" (July 1, 1991). If a case came before the Department that had qualified for the benefits of EPA's policy, it would, in all likelihood, qualify for leniency under the Department's policy as well. Of course, the Department is always duty bound, under the "Principles of Federal Prosecution," (9–27.000 USAM) to independently assess the evidence and make prosecution decisions based upon the evidence in each case.

RESPONSES FROM LOIS SCHIFFER AND VERONICA COLEMAN TO QUESTIONS FROM SENATOR GRASSLEY

Question 1. Several environmental statutes, like the Clean Air Act, allow states to take the lead in the enforcement of environmental laws through the development of state programs satisfying federal minimum standards. However, some states which have enacted or are considering legislation dealing with an environmental audit privilege or disclosure immunity, have reportedly been pressured by EPA to reject such polices or have final approval of their programs withheld or withdrawn. In fact, an April 5, 1996, EPA memo establishing criteria for Title V approvals states that where a state privilege or immunity law deprives the state of adequate enforcement authority, "it must be amended before final Title V approval can be granted." This is the case regardless of the success or benefits the privilege may have produced at the state level.

Question 1a. Shouldn't states be able to enact and administer their own environmental audit protection and voluntary disclosure legislation that they believe protects the public and environment without federal prosecution of companies who want to take advantage of such protections? Shouldn't states rights be recognized and why?

Answer 1a. The Department is sensitive to the federalism concerns that can arise in connection with enforcement of federal environmental laws. Many federal statutes provide for state implementation of federal environmental progress, but they also preserve the right of the federal government to bring enforcement actions when necessary to ensure compliance with federal environmental standards. Enforcement of federal minimum standards serves to protect public health and the environment and to ensure fair application of the laws regardless of whether the EPA or state agencies are administering them.

Question 1b. How have you dealt (or how do you plan on dealing) with situations where a company has attempted to withhold information under a state privilege?

Answer 1b. Even though state environmental audit privilege laws have been in place only a short time, we have already begun to see claims of privilege in both criminal and civil enforcement actions. Although we expect to argue successfully that state privilege laws do not apply in federal enforcement actions, we also expect to litigate this question more often as newly-enacted state privilege statutes takes effect.

Question 1c. In what respects in adoption of the privilege and/or immunity protections under state law incompatible with current EPA and DOJ enforcement policy?

Answer 1c. A substantial number of the environmental enforcement cases brought by the federal government stem from investigations done in whole or in part by state and/or local environmental officials. This is a cooperative relationship that has been steadily developing over the past decade, and it is central to the federal government's enforcement policy. If state inspectors and investigators are unable to have access to relevant evidence or if that access becomes uncertain, environmental enforcement actions will decline and protection of the public health and natural resources will suffer. In addition, the attempt to apply state audit privilege and/or immunity protections in federal cases is expected to result in a significant increase in litigation.

Finally, DOJ and EPA enforcement policies, as originally noted in our response to Senator Thurmond's final question, are premised upon the ability of the public and the government to have access to information relating to the handling of environmental contaminants. Citizens and government agencies use such information to

make reasoned judgments regarding steps to protect public health and safety and to fashion appropriate responses to violations.

Question 2. EPA criticizes state audit privilege and/or immunity legislation and S. 582 affecting the ability to enforce environmental laws in criminal and emergency situations. Yet witnesses testified at the hearing that states still will retain the ability to enforce their environmental programs through emergency orders and injunctive relief and that they are fully able to carry out their criminal enforcement authority.

Question 2a. Has EPA made any determinations with respect to the impact of individual state statutes on Title V enforcement or the enforcement of other environmental statutes? Has EPA determined that any of the state statutes do not affect the state's enforcement ability? Has EPA determined that any state has adopted particularly egregious laws which would undermine the state's ability to enforce its programs?

Answer 2a. The Department defers to EPA for a response to this question.

Question 2b. Please provide the basis of your opinion that S. 582 offers immunity to repeat violators. Since the bill states that the privilege is not afforded when disclosure is made by an entity that "has been found by a Federal or State court to have committed repeated violations of Federal or State laws, or orders on consent, related to environmental quality due to separate and distinct events giving rise to the violations, during the 3 year period prior to the date of disclosure"; doesn't this cure your problem? (*See* Section 2(a) of S. 582.

Answer 2b. The "repeated violations" exception requires a prior finding by a court of past, repeated violations (or a prior consent order covering such violations). Thus, an entity that successfully evaded detection of its past violations would qualify for immunity regardless of the duration or gravity of those violations. Those against whom prior administrative action had been taken would qualify as well.

Our written testimony (pp. 6–7) describes an actual criminal prosecution in which a company's illegal disposal of hazardous wastes in a dumpster resulted in the deaths of two children. Despite the gravity of this offense, had the company learned of the violation before the government and promised to clean up the dumpster, under thee immunity provisions in S. 582, the company would not have been classified as a "repeat violator" and could have been immune from all civil and criminal sanctions.

Accordingly, under the provisions of this bill, even a serious, long-term violator may receive immunity for all prior violations that had not been the subject of a previous judicial enforcement action.

Question 3. One of the criticisms that EPA and DOJ have about the bill is that evidence will be buried under the privilege and that the government will not be able to effectively prosecute cases.

Question 3a. How does a voluntary environmental self-evaluation privilege or disclosure immunity such as that provided in S. 582 restrict the government's ability to obtain evidence in criminal investigations and compromise enforcement? Isn't an *in camera* hearing an adequate method of determining the privilege?

Answer 3a. The privilege and immunity provision of S. 582 would interfere with criminal investigations, make evidence critical to enforcement unavailable to the government, and would interfere with the government's ability to obtain appropriate relief for civil and criminal violations. The *in camera* hearing mechanism is inadequate to address these concerns both because it is too limited and because it leaves criminal investigators with an impossible choice.

First, certain evidence that is critical to enforcement, such as evidence concerning determination of the cause, scope, or harm resulting from environmental violations would remain concealed from law enforcers, even with the *in camera* review, because it is outside the scope of the exceptions to the privilege contained in S. 582. Evidence shielded by the privilege could include efforts to conceal violations as well as evidence of knowledge and motive. The Department's testimony (pp. 13–14) described two examples of situations in which the privilege in S. 582 would conceal critical evidence and no exception would apply.

Moreover, S. 582 leaves investigators with two inadequate choices. As explained in our written testimony in more depth (pp. 12–13), the privilege in S. 582 would impair our ability to investigate tips concerning unlawful conduct by creating the possibility that investigators would rely upon evidence that, unbeknownst to the investigators, was covered by the broad evidentiary privilege of S. 582. The result could be disqualification of the investigator or exclusion of evidence derived from privileged information or both. The only way that the investigator could be certain to avoid this problem would be to invoke the *in camera* process at the outset of the investigation, but that process is also inadequate because it requires notifying the target and results in short-circuiting the investigation.

Finally, there is no *in camera* process applicable to the immunity provision of S. 582, which operates directly to prevent imposition of criminal fines, civil and administrative penalties, and cease and desist orders to address violations of the law.

Question 3b. How does the bill's audit privilege make investigations of criminal behavior more difficult, interfere with routine enforcement actions or compromise the public's right to know, if S. 582 expressly excludes from the privilege information "required to be collected, developed, maintained, or reported to a regulatory agency"; "obtained by observation, sampling, or monitoring by any regulatory agency"; or "obtained from a source independent of the environmental audit"? (See section 2(a) of S. 582) Don't these exemptions from the privilege allow EPA to have the same access to information that it has today?

Answer 3b. While the exemptions to the privilege in S. 582 allow EPA to continue to have access to some compliance information, the bill would deny access to those sources of information necessary to to determining the reliability of that compliance information. This problem is profound when there is criminal conduct, such as falsification of monitoring reports or sampling data. Under a testimonial privilege, such as that in S. 582, in which those associated with an audit are barred from speaking, prosecutors are deprived of a potentially important source of facts concerning such covert behavior. It is from internal communications and documents like audits and self-evaluations that information may be drawn allowing prosecutors to evaluate the extent of knowledge and degree of culpability of both companies and their managers and employees regarding violations of environmental laws.

In addition, the exceptions to the privilege in S. 582 cannot cure the privilege's interference with the government's ability to execute search warrants after having demonstrated probable cause to believe that criminal conduct had occurred. Whereas now the agents executing a criminal search warrant are able to segregate those documents that appear to involve an attorney and thus might be subject to the attorney-client privilege, they would have no way of determining which records to segregate as potentially falling within the environmental audit privilege. Documents relating in any way to environmental compliance would be deemed privileged and those investigators who had read them arguably could be disqualified from further participation on the case.

Question 3c. How does EPA and DOJ policy effectively take care of this problem?

Answer 3c. DOJ's and EPA's policies encourage companies to self-police and to disclose any problems they discover to the government and to the public. Thus, responsible corporate behavior is encouraged through penalty mitigation and the exercise of enforcement discretion. Information the public needs to know is made public and criminal prosecutions proceed appropriately.

Question 3d. Have there been any criminal referrals to DOJ under the EPA policy so far? If so, what have they involved and what was the criteria for criminal referral? Further, has DOJ initiated any prosecutions where EPA/state prosecutors had declined to issue a recommendation to prosecute? If so, why did DOJ exercise its prosecutorial discretion and are there any criteria for taking such action?

Answer 3d. To our knowledge, there have been no cases in which application has been made to EPA for coverage under the Audit Policy and EPA then referred the case for criminal prosecution to the Department of Justice. In the more than 700 environmental criminal cases prosecuted by the federal government since 1982, only a handful involved the use of an actual environmental audit report for any purpose.[1] In those cases, the audit was obtained after an investigation was well underway based on other evidence, and the audit was used to provide direct evidence that someone knew of ongoing violations (and, in some cases, of the environmental harm likely to result from those violations) and chose not to correct them.

Question 3e. What is the basis of your belief that S. 582 allows companies to keep an economic benefit from noncompliance where that economic benefit is substantial and deliberately obtained? According to the bill, only audits conducted for the express purpose of determining whether the entity is in compliance with federal law are covered by the privilege. Doesn't deliberate noncompliance suggest that an audit was conducted in bad faith or for fraudulent purposes and disqualify such an audit from the privilege, thereby addressing your concerns?

Answer 3e. In answering this question, it is important to keep separate the privilege and immunity provisions of the bill and to recognize that fraud and deliberate

[1] These involved the use of documents that generally would meet EPA's definition of "environmental auditing," which is "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." 60 Fed. Reg. 16875, 16876 (April 3, 1995). In contrast, daily factory inspections and other such routine business practices appear to be potentially privileged "environmental audits" pursuant to S. 582.

noncompliance are distinct concepts as well. Neither the privilege nor the immunity provision of the bill has an exception for deliberate noncompliance. Only the privilege provision has an exemption for fraud, but, the fraud exception is too narrow. A legitimate, good faith audit may provide evidence of criminal conduct unrelated to the commissioning of the audit itself, yet this bill would deny access to that evidence. In order for the prosecution to prove fraud so as to overcome the claim of privilege, the bill would, in effect, require the prosecution to prove the ultimate facts of the case, i.e., that there were intentional violations and fraud.

There is an undefined "fraudulent purpose" exception to the evidentiary privilege; however, the bill does not make fraud a factor to be considered in determining whether immunity applies to a disclosure. Thus, even if an audit were deemed fraudulent from a privilege perspective, that does not mean that the violator would be disqualified from immunity from a penalty that would, at a minimum, strip away the economic benefit of its violations.

Moreover, even if the fraud exception did apply to the immunity provision, it would not suffice to prevent companies from benefitting from non-compliance. To cut costs, Company A avoids any investment in the water pollution control equipment it needs to comply with the Clean Water Act, thereby saving a million dollars over a five-year period. Company B, A's competitor, spends that million dollars to comply with the law. Finally, Company A decides that it no longer wishes to risk being caught in violation of the law and prosecuted. It undertakes an environmental audit to determine what needs to be done to bring it into compliance with water pollution abatement requirements. The audit outlines in detail the lack of abatement equipment and the resulting environmental violations, and it describes the steps necessary to come into compliance with the law. In other words, there is nothing fraudulent about the audit. (In any event, the fraud issue never emerges because Company A seeks only immunity, not an evidentiary privilege.)

Then Company A discloses its prior violations and thereafter corrects them. Under S. 582, Company A qualifies for immunity from "any administrative, civil, or criminal penalty" despite its prior intentional violations. Because Company A would not disgorge its economic benefit of noncompliance, Company B's responsible conduct would put it at a competitive disadvantage to Company A.

Question 4. Industry proponents have stated that the EPA Final Policy is just that, "just a policy" that can be changed at any time and that it has no force of law. They argue that since EPA's guidance is not law, EPA's regions are not bound by the conditions of the policy and, further, under the policy companies do not have any enforceable rights. What is your response to these statements?

Answer 4. The Department defers to EPA for a response to this question.

Question 5. In its written testimony, DOJ states that the statute is "hopelessly flawed." However, I think we all believe that the evidentiary privilege and the parameters of disclosure immunity in S. 582 need to be further defined and more specifically delineated. Additionally, I'm sure you know that the purpose of the bill is not to interfere with law enforcement, conceal information, or reward violators of the law—rather the goal is to encourage companies to proactively look for environmental problems and then promptly fix them.

Question 5a. Would EPA and DOJ be opposed to a more specifically crafted privilege that addressed these concerns, or is penalty mitigation the only answer? Why?

Answer 5a. A very limited category of highly sensitive communications, such as those between a husband and wife, or attorney and client, have been given evidentiary privilege under the law based on the belief that society as a whole will benefit if these communications are kept confidential. These benefits are seen to outweigh the interference with law enforcement and the increase in litigation that these privileges create.

DOJ would oppose any new evidentiary or testimonial privilege for environmental audit reports. As our testimony discussed in some depth (pp. 16–21), such a privilege is unnecessary and counterproductive and would not result in any significant benefit to society that existing privileges provide. On the contrary, we believe such a privilege would result in increased harm to the environment and public health. Moreover, narrowing the privilege that would be created by the present bill is not the answer. We believe there is no need for an environmental audit privilege and no way to draft such a privilege that would avoid adverse consequences, such as crippled enforcement, impaired investigations, and unnecessary litigation.

Question 5b. What specific provisions in S. 582 are problematic and why? Please provide a summary of the current provisions of S. 582 that you continue to oppose and/or have concerns about. How do you suggest these provisions need to be tailored to conform with EPA/DOJ enforcement criteria?

Answer 5b. We oppose the bill in its entirety and continue to believe that it is "hopelessly flawed." As outlined in our written testimony at pp. 5–9, we believe that

the immunity provisions for self-disclosed violations would directly interfere with fair and effective enforcement of the law. As set forth in our response to question 5(a), and in our written testimony at 9–16, we believe that an environmental audit privilege would interfere with the truth-seeking process, impair law enforcement, result in abuse, and conceal information vital to public health and safety.

RESPONSES FROM MARK WOODALL TO QUESTIONS FROM SENATOR THURMOND

Question 1. In each of your views, is the proper way to evaluate this legislation to determine whether, considering all factors, it will result in a healthier and cleaner environment than in its absence?

Answer 1. Whether S. 582 or no bill would result in a healthier and cleaner environment is certainly an important criterion. This should not be the only standard.

Sending all cigarette smokers to concentration camps would result in healthier and cleaner indoor air but would violate people's constitutional rights. S. 582 fails the cleaner environment test as well as the destruction of people's constitutional rights test.

Question 2. Would any of you care to comment on the extent to which this legislation would permit companies to work cooperatively with enforcement agencies to find solutions to problems, rather than posturing and fighting over technicalities and unhelpful questions of interpretation?

Answer 2. The EPA's final audit policy as well as the EPA's final policy on compliance incentives for small business are both crafted to allow responsible companies to find, disclose and fix environmental problems. The small business policy also provides special incentives to small businesses to participate in compliance assistance programs.

These policies represent a reasonable approach to helping companies comply with sometimes complex laws.

The corporate polluter privilege proposed in S. 582 would make government officials co-conspirators in obstruction of justice. As was mentioned in last month's hearing, similar provisions in banking law would allow a bank president to come in and say he had been stealing for years but was not going to stop. It would be a self-disclosed violation so it would be secret and the banker would be immune from any penalty. This hardly seems in the public interest.

Question 3. As the Chairman of the Antitrust, Business Rights, and Competition Subcommittee, I am interested in each of your views on whether it is desirable to attempt to protect competition by imposing fines based on any "economic benefit" which a company has obtained by lack of compliance with environmental laws or regulations. That is, if a company unintentionally benefits from being out of compliance, does that give it an unjustified competitive edge over its competitors that needs to be addressed, or would the cure be worse than the problem?

Answer 3. It is indeed desirable to protect fair competition and provide a level playing field by imposing penalties for any economic benefit form noncompliance. This is exactly the current EPA policy. The final policy notice in the Federal Register of December 22, 1995 covers this situation on page 66707.

"After considering public comment, EPA has decided to retain the discretion to recover economic benefit for two reasons. First, it provides an incentive to comply on time. Taxpayers expect to pay interest or a penalty fee if their tax payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field. The concept of recovering economic benefit was supported in public comments by many stakeholders, including industry representatives (see, e.g., Docket, II–F–39, II–F–28, and II–F–18)."

In stark contrast to the EPA policy, S. 582's privileges and immunities would destroy the level playing field and reward bad actors for their noncompliance.

RESPONSES FROM MARK WOODALL TO QUESTIONS FROM SENATOR GRASSLEY

Question 1a. Could you specifically explain why penalty mitigation is preferable to legislation establishing an absolute or qualified privilege?

Question 1b. How does EPA and DOJ policy provide a better solution?

Answers 1a and b. Penalty mitigation is preferable to privilege because it does not violate the public interest in the many ways a new statutory privilege would.

It was the Supreme Court that declared privilege a disaster for effective enforcement. As submitted in my written testimony, the Court observed in 1988, "The greater portion of evidence of wrong-doing by an organization or its representatives

is usually found in the official records and documents of that organization. Were the cloak of privilege to be thrown around these records and documents, effective enforcement of many federal and state laws would be impossible."

The privilege proposed in S. 582 would allow critical evidence to be concealed. This concealment would betray the public interest and serve only the narrow special interest. As the Supreme Court has stated, "the public * * * has a right to every man's evidence."

The privilege contemplated in S. 582 would result in endless bickering over applicability and tie up the judiciary in time-consuming battles.

Privilege would destroy the transparency and openness which is the goal of such laws as right-to-know. It runs directly counter to the trend toward greater public disclosure and accountability in environmental law. It would create suspicion and distrust in the activities of companies and government bodies.

In contrast to the many problems posed by privilege, the policies of the EPA and DOJ address the legitimate concerns of the regulated community in a reasonable and responsible manner. The EPA's audit policy provides incentives for self-policing without endangering the public health and environment.

The elimination of gravity-based penalties for a company which finds, reports and fixes a problem without creating a Bhopal-type situation seems fair to all parties. The conditions or protections associated with getting a 100% penalty elimination are straight-forward and necessary.

The EPA has significantly broadened the policy at the request of the regulated community to include violations discovered through due diligence such as compliance management systems. This addition to the policy addresses a significant concern of the regulated community which was repeatedly raised during the eighteen-month public review period.

The EPA policy also states that no criminal referrals will be made where the conditions of the policy are met unless there is some aggravating circumstance. The EPA policy protects against "fishing expeditions" by ruling out requests for audit documents during routine inspections.

The new EPD Final Policy on Compliance Incentives for Small Businesses is effective on June 10, 1996. This policy has only four criteria for small businesses who wish to receive its benefits. This policy should help small businesses comply with environmental, health and safety laws and allay fears of unfair treatment of small businesses by regulators.

The EPA's policy does retain the discretion to recover any economic benefit that may have been realized by noncompliance. This preserves a level playing field for all companies. It would be patently unfair for 99% of an industry to comply with the law and the remaining 1% to gain an economic advantage from not complying.

What more than the EPA and DOJ policies could responsible corporations desire? It is outrageous to suggest that audit documents should be hidden from judges and juries. Only criminals and those contemplating criminal acts would benefit from a counter-productive corporate polluter privilege.

Question 1c. Would your position change if S. 582 were to be redrafted to delineate the parameters of the privilege/disclosure immunity and to specifically provide that bad actors are not to be protected?

Answer 1c. No, the Sierra Club is adamantly opposed to the creation of any new statutory privileges or immunities no matter how they might be delineated. Privilege/immunity legislation of any form is unnecessary, reckless, ridiculous and fraught with the potential for abuse.

Meaning no disrespect to the committee, this proposal is a sell out to a certain class of criminals—rich corporations. Should a general amnesty be declared whenever the profit motive is involved?

Question 1d. What specific provisions in S. 582 are inconsistent or incompatible with your position and why? Please provide a summary of the current provisions of S. 582 that you continue to oppose and/or have concerns about. How do you suggest these provisions need to be tailored to conform with your position?

Answer 1d. There is nothing in S. 582 that we can in any way support. The privilege and immunity provisions of S. 582 are poisonous to the public interest and opposed by the EPA, DOJ, the National District Attorneys Association, numerous state attorneys general and too many public interest groups to list.

Question 1e. What would be your solution to help ensure environmental compliance given that only limited funds are available?

Answer 1d. There is a lack of compliance with laws against homicide and only limited funds are available to address murderers. Does this mean we should enact new privileges and immunities for killers? This seems a strange new direction for a reputed law and order Congress.

The environmental laws enumerated in S. 582 have resulted in great progress. Cleveland's Cuyahoga River no longer catches on fire. The bald eagle once again soars majestically over much of the United States.

We should not make it impossible to enforce the environmental, health and safety laws which have accomplished so much by enacting corporate polluter privilege legislation such as S. 582.

Ensuring environmental compliance and a healthy environment for future generations will require a new paradigm for corporate responsibility. As Paul Hawken points out in "The Ecology of Commerce—A Declaration of Sustainability," "To create an enduring society, we will need a system of commerce and production where each and every act is inherently sustainable and restorative."

Additional Submissions for the Record

Chemical Manufacturers Association,
Arlington, VA, May 31, 1996.

Re Clarifying CMA's Views on EPA's Audit Policy:

Hon. Charles E. Grassley,
135 Hart Office Building, U.S. Senate, Washington DC.

Dear Senator Grassley: The Chemical Manufacturers Association (CMA) commends you for conducting the May 21 hearing on S. 582 and voluntary environmental audits. We look forward to markup of legislation to promote environmental self-assessment and disclosure. As you noted during the hearing, the public and the environment will both benefit from creative ways of promoting voluntary efforts that increase compliance and disclosure.

I am writing to correct a misleading impression regarding CMA's views on EPA's audit policy which may have been created by the statement of Steven A. Herman, EPA's Assistant Administrator for Enforcement and Compliance Assurance. The thrust of Mr. Herman's statement was that any federal legislation is unnecessary because EPA's recent audit policy has accomplished all that needs to be done to promote self-assessment and disclosure. To that end, Mr. Herman quoted CMA as follows:

"We believe the new policy will substantially promote the use of environmental auditing and compliance management systems. It should also lead to greater willingness to disclose noncompliance discovered through these activities. the result will be greater environmental protection through the prevention of noncompliance, as well as greater public awareness of regulated entities' compliance status and efforts."

This quotation, while accurate, is not a complete statement of CMA's views on either EPA's policy or the need for federal legislation. the quote was taken from a CMA statement issued when the EPA policy was released (Attachment 1). That statement continued:

"Still, the new policy is not ideal. Potential difficulties lurk in the narrow definition of 'repeat violations,' as well as in the possible requirement to provide information on 'other related compliance problems.' Most significant, the policy expresses firm opposition to self-evaluative privilege legislation. Regulated entities have very real and legitimate concerns about the ability of third parties, including state and local governments, to use self-evaluative materials against the persons generating them. Nothing EPA says or does can bind such third parties. CMA continues to support appropriately qualified legislation that would protect self-evaluative materials from being used by these entities, at least.

The statement also urged that the EPA policy—appropriately revised—be codified as a regulation and that EPA revise its "inappropriately by punitive" methods for assessing the economic benefit of noncompliance.

Mr. Herman's statement fails to include CMA's significant qualifications to EPA's policy. Unfortunately, this is not the first time this has happened. In testimony before the Michigan legislature, an EPA lawyer inaccurately characterized the views of the Compliance Management and Policy Group (an informal group of associations and companies to which CMA belongs), as explained in his subsequent corrective letter (Attachment 2). Clearly there is room for common ground on these issues. Progress toward it is only slowed, however, when one's views get distorted.

CMA stands by its full statement—EPA's new policy is better than its prior practice, and will lead to an increase in auditing and disclosure. We said then, and we say now, however, that the best way to promote these shared goals is appropriately

crafted privilege and immunity legislation. While such legislation may resemble the policy in some respects, the policy standing alone is no substitute for comprehensive legislation.

Sincerely,

TIMOTHY F. BURNS,
Vice President, Federal Government Relations.

PREPARED STATEMENT OF DAVID F. ZOLL, VICE PRESIDENT AND GENERAL COUNSEL

On December 18, EPA released its final policy on the disclosure of violations that regulated entities discover through voluntary self-evaluation. CMA commends the Agency for issuing this policy, as it represents a substantial, positive development in the Agency's views on the subject. We also salute the Agency for instituting the open, 19-month process that gave rise to the new policy. Through the Compliance Management & Policy Group, CMA has been an active participant in this process, particularly by cosponsoring the Price Waterhouse study on attitudes and practices regarding auditing and disclosure and the ABA stakeholder dialogues.

By its new policy, EPA recognizes the increasing importance of companies' own efforts in assuring compliance. EPA has also committed itself to treating companies that find, fix and disclose noncompliance more favorably than those that do not. We believe the new policy will substantially promote the use of environmental auditing and compliance management systems. It should also lead to greater willingness to disclose noncompliance discovered through these activities. The result will be greater environmental protection through the prevention of noncompliance, as well as greater public awareness of regulated entities' compliance status and efforts.

The new policy is a significant improvement over the Agency's April 1995 interim policy. Most important, it offers the same benefits to all entities that voluntarily discover noncompliance and then report it, regardless of whether that reporting was mandatory. The new policy also encourages entities to implement compliance management systems, recognizing that such systems actively prevent noncompliance. The policy extends its protections to violations of reporting requirements, and clarifies that a disclosure does not constitute an admission.

Still, the new policy is not ideal. Potential difficulties lurk in the narrow definition of "repeat violations," as well as in the possible requirement to provide information on "other related compliance problems." Most significant, the policy expresses firm opposition to self-evaluative privilege legislation. Regulated entities have very real and legitimate concerns about the ability of third parties, including state and local governments, to use self-evaluative materials against the persons generating them. Nothing EPA says or does can bind such third parties. CMA continues to support appropriately qualified legislation that would protect self-evaluative materials from being used by these entities, at least.

CMA also believes that the subject of this policy is sufficiently important to warrant its being codified as a regulation, and we appreciate that the Agency "is still considering this matter." We are also encouraged by the Agency's statement that "EPA personnel will be expected to follow this policy, and the Agency will take steps to assure national consistency in application." The success of the policy will depend on EPA implementing it in an even-handed and reasonable way. We also urge EPA to actively encourage states to adopt similar policies or legislation.

During the next three years, EPA has pledged to complete a study of the policy's effectiveness. CMA believes this is a good idea. In the meantime, one way in which the Agency could certainly increase the effectiveness of the policy would be to revise its "BEN" model for determining the economic benefit of noncompliance. While CMA supports the theory that violators should not be able to undercut law-abiding competitors, the BEN model disregards economic reality and is inappropriately punitive, as CMA and others have explained in a rulemaking petition now pending with EPA. Companies will be encouraged to disclose noncompliance when this model has been revised, and we look forward to working with the Agency on it.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Chicago, IL, February 27, 1996.

Re Environmental Audit Privilege and Immunity Information

Hon. BILL SCHUCK,
Ohio House of Representatives, Chairman, Energy and Environment Committee, Columbus, OH.

DEAR MR. CHAIRMAN SCHUCK: This letter is written to send you additional information on the consequences of serious releases of toxic substances in Ohio and to clarify a portion of my testimony on environmental audit privilege and immunity issues before the Ohio House of Representatives Energy and Environment Committee on February 8, 1996.

In my letter dated February 12, 1996 to your office, I promised to send you information on the number of serious chemical and toxic releases occurring in the State of Ohio in recent years as a follow up to the Scientific American article entitled "Toxics Abounding" which you had requested. I have attached (Attachment "A") some statistics concerning such releases in Ohio which led to death, injury or evacuation during 1993, 1994, 1995, and early 1996.

I also wish to clarify a statement made during my testimony before your committee on February 8, 1996, concerning the Compliance Management & Policy Group's ("CMPG") position regarding U.S. EPA's authority to recoup the economic benefit that a violator of the environmental laws has gained. In my testimony I stated that the CMPG supported the recapture of economic benefit where companies intentionally or unintentionally gain an unfair competitive advantage over their complying competitors. The CMPG's actual position on this issue, as identified by Nancy W. Newkirk, Counsel for the CMPG (in Attachment "B" to this letter, CMPG letter at page 9, 10), is that "[Economic benefit penalties] should be imposed only where the economic benefit of noncompliance was intentionally sought, was clear and substantial and where, in fact, it gave the violator a competitive advantage in its immediate competitive sphere." U.S. EPA still firmly believes that the recovery of an economic benefit of a violation ensures that a violator does not gain a competitive advantage, even if it was unintentional, over others who invested resources to meet environmental requirements.

I have attached copies of several other comments to the U.S. Environmental Protection Agency, which support the concept of recoupment of economic benefit by the Agency against certain violators, from several other businesses and business groups, including General Electric, the Chemical Manufacturers Association, and the National Automotive Radiator Service Association. See Attachment "B" to this letter.

If you have any questions regarding any of the attached materials or other human health or audit privilege and immunity issues, please feel free to contact me at (312) 888–1308.

Sincerely yours,

BERTRAM FREY,
Deputy Regional Counsel.

PREPARED STATEMENT OF THE COLORADO ASSOCIATION OF COMMERCE AND INDUSTRY

The Colorado Association of Commerce and Industry ("CACI") is pleased to submit these comments in support of S582, the Voluntary Environmental Audit Protection Act. CACI represents approximately 1,500 Colorado businesses, 80% of which have 100 or fewer employees. CACI appreciates the opportunity to provide comments regarding Colorado's environmental audit privilege and voluntary disclosure law, which has been an important issue for our Association for the past seven years. In 1989, Colorado was the first state to consider an environmental audit privilege law, and was the first state to pass an audit privilege and voluntary disclosure law in 1994. Two years later, seventeen states now have similar laws.

POLICY REASONS FOR S582

Incentives and protections

Colorado Senate Bill 94–139, which is attached, is similar to S582 in many respects. S582 provides an evidentiary privilege for environmental audit reports and creates an immunity from certain penalties for voluntarily disclosed instances of noncompliance. The primary purpose of both pieces of legislation is to maximize environmental compliance, thereby increasing protection of public health and the environment. In order to encourage companies to conduct compliance audits voluntarily, protections need to be provided and incentives need to be created. S582 provides

those protections and incentives but also protects against abuse and requires companies to achieve compliance in order to enjoy the protections provided under the law.

S582 creates three different types of incentives to encourage voluntary compliance with environmental laws: (1) an incentive to investigate through its audit privilege; (2) an incentive to disclose through its immunity for voluntary disclosure; and (3) an incentive to remedy through its prompt response requirements. All of these incentives are discussed in more detail below. They clearly demonstrate a truth that has been lost on many prosecutors, regulators, and members of the environmental community: privilege/immunity laws do not "protect polluters." They encourage companies to comply with the law—more quickly, more cost effectively and more efficiently than traditional environmental enforcement.

CACI's member companies certainly want to comply with environmental laws and regulations but often find the laws or regulations confusing; even the most sophisticated companies with significant legal expertise find it difficult to definitively interpret or comply with each and every environmental regulation. Colorado companies are not unique in this respect. A National Law Journal article from August 30, 1993, reported that in a survey of in-house environmental counsel for 200 companies, two-thirds of those environmental counsel reported that they knew their companies were out of compliance with one environmental law or regulation. Again, this situation occurs not because companies do not care about complying with environmental laws and regulations, it occurs because of their complex nature.

While some companies, particularly larger ones, currently perform environmental audits, such audits are frequently performed under an attorney-client privilege—a protection that does not permit information to be shared with all employees. It also adds significant costs. In other instances, the company may have simply resigned itself to the fact that such information could be discovered by a regulatory agency. However, small and mid-size companies often decide, for a number of reasons, not to perform environmental evaluations. In order to encourage all companies to investigate their own facilities, CACI believes, and the Colorado General Assembly agreed, it is critical to provide a mechanism to keep this information privileged from discovery. However, there may be appropriate circumstances for an environmental audit report to be subject to discovery, and S582 provides a balanced approach to avoid abuse of the privilege.

Industry needs the certainty provided by S582. Leaving EPA with the discretion to observe or ignore confidentiality of information voluntarily identified by a company presents a tremendous disincentive to conducting environmental audits. The Environmental Protection Agency's (EPA's) Final Policy Statement on Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations dated December 22, 1995, 60 Fed. Reg. 66706, ("Final Policy Statement"), simply promises information identified in an environmental audit report will not be used to initiate an investigation, that it will probably not be used for criminal prosecutions of a company, or that the performance of an environmental audit may be a factor in reducing fines or penalties (although not economic benefit penalties), leaves too much uncertainty to provide an incentive to encourage a great many companies to conduct voluntary self-evaluations. Moreover, the experience of many CACI members is that much policies are often honored in the breach.

Furthermore, companies that are conducting audits and, as a result, identifying areas of noncompliance, are frequently torn between voluntarily disclosing this information to a regulatory agency—with the possibility of significant fines or penalties—or simply keeping the information to themselves and addressing the issues on their own. Colorado's law makes this decision somewhat easier for a company. Companies choosing to voluntarily disclose self-evaluation to the appropriate regulatory agency now know the Colorado Department of Public Health and the Environment (the "Department") cannot assess administrative, civil or criminal negligence penalties as a result of that disclosure. They also know that as a result of the disclosure they must correct any noncompliance promptly but in no event longer than two years. As a result of the voluntary disclosure, the Department will have input and oversight into how the noncompliance is corrected, and the noncompliance is addressed earlier than it might otherwise have been. In addition, voluntarily disclosed information alerts the regulatory agency to an issue that it may never have discovered on its own. As a result, the environment benefits by the voluntary disclosure. CACI believes this same protection, as embodied in S582, in necessary at the federal level as well.

Increased environmental compliance

With adequate protections and incentives, companies will be encouraged to evaluate their environmental compliance as opposed to simply waiting for EPA or a state regulatory agency to conduct an investigation or to pursue an enforcement action

against them. It is unlikely there would ever be enough enforcement officers to identify each and every area of noncompliance at a facility. Even an inspector can fail to identify every area of noncompliance during an inspection. As a result, companies performing a voluntary self-evaluation will have the time and ability to more thoroughly determine their compliance with environmental laws. Colorado's law, as would S582, then requires the company to come into compliance in order to benefit from the privilege and the penalty immunity.

Importantly, Colorado's law, as well as S582, provides incentives to comply without affecting any enforcement authorities. For example, the bill does not relieve companies of the obligation to comply with the reporting and recordkeeping requirements of existing law. S582 does not protect environmental audits made for fraudulent purposes. It does not prevent EPA or the Department of Justice ("DOJ") from using information obtained independent of the audit. Finally, it does not create immunity for voluntary disclosures made by "bad actors." In order words, EPA and DOJ retains all of its enforcement authorities against non-complying companies.

Companies do not trust regulatory agencies

EPA's Final Policy Statement provides some guidance as to when EPA intends to assess punitive penalties from a company that voluntarily discloses. However, this Final Policy Statement is so fraught with uncertainty, qualification, exceptions and limitations that it actually provides no assurance that punitive penalties won't be assessed by EPA. The bottom line is that companies fear the potential punitive actions of regulatory agencies and particularly EPA.

The Colorado Pollution Prevention Partnership, which is an organization with representatives from industry, environmental groups, EPA Region VIII and the Department; conducted a survey of Colorado's small and mid-size businesses. The survey, published in June 1994, summarized that the "results indicated a strongly antagonistic attitude toward the government." When asked if the government was a good place to go for help, the response was "that the EPA was not interested in helping companies be less environmentally damaging; and that environmental agencies were more interested in fining the companies they regulated." Pollution Prevention Practices and Attitudes, page 31. The survey also identified several barriers to the widespread adoption of pollution prevention.

A second and more serious barrier was the antagonistic relationship that was exposed between small business and the government. Attitudes toward government and government regulations were uniformly negative. Some respondents said that when they asked the government for help on an existing problem, the government would inspect their site and fine them for the very problem they had asked the government to help them solve.

Pollution Prevention Practices and Attitudes, page 38.

These fears are not unjustified. There are many examples of responsible companies being assessed penalties for trying to improve their environmental performance. One Colorado company has had an experience where EPA, after including a 25% penalty reduction, assessed a penalty of $196,000 for reporting paperwork discrepancies that were discovered as a result of a voluntary self-evaluation and were immediately corrected. It is highly unlikely EPA would ever have discovered this problem on its own. Perhaps the most troublesome example involved a Colorado company that performed a voluntary study that was not required by law, kept the Department informed throughout the study and provided detailed results of the study to the Department. What the voluntary study found was that EPA guidance documents grossly underestimated air emissions from the types of facilities operated by the company. For identifying sources that had been missed by every regulatory agency for similar facilities across the country, the company was "rewarded" with the assessment of a $1,000,000 penalty, which included a 40% reduction. Companies clearly have reason to fear punitive actions by regulatory agencies.

Innovative approaches should be encouraged

It is time to initiate innovative ways to encourage environmental compliance. The historic "command and control" approach used by EPA and the states needs to be supplemented with an incentive-based approach. It is time for EPA to recognize that additional methods, such as carefully drawn environmental audit privileges and penalty immunity for voluntary disclosures, are necessary to achieve environmental compliance. It is time for EPA to recognize that most companies are trying to comply with environmental laws and regulations because they want to be good corporate citizens, not because EPA can assess fines or penalties. And, it is time to create a relationship of trust, respect and understanding between industry, EPA and the states. Legislation such as S582 provides the necessary incentives and protections

for companies to achieve even greater levels of compliance with environmental laws and regulations.

NEED FOR FEDERAL LEGISLATION

States' rights

While environmental audit privilege and voluntary disclosure laws have received enthusiastic legislative support with passage of laws in 17 states[1] within the last three years, EPA remains adamantly opposed to privilege laws. Obviously states are empowered under the Tenth Amendment to the United States Constitution to enact their own laws. However, EPA can effectively prohibit the implementation of these laws. EPA has stated on numerous occasions that it will take separate enforcement actions in states with privilege or voluntary disclosure laws, thereby eliminating the benefit of these laws to compliance efforts in that state.

This fear of EPA overfiling is not hypothetical. EPA has attempted to kill these bills in a number of states as demonstrated by the attached letters to the State of Virginia, and the Governor of New Hampshire. EPA even wrote a letter to Colorado's Governor asking him to veto Senate Bill 94–139. EPA's efforts, however, are not limited to the legislative arena. In addition to threatening statements in the June 20, 1994 notice of the July public meeting soliciting comments on its 1986 Audit Policy, EPA asked the four states that had laws at the time to provide "documentary justification" for the passage of their laws. In addition, the Final Policy Statement contains threatening language to states with privilege/immunity laws. Specifically, the Federal Register notice states "[T]he Agency remains opposed to state legislation that does not include these basic protections, and reserves its rights to bring independent action regulated entities for violations of federal law * * *." 60 Fed. Reg. 66710.

Once states have passed privilege/immunity laws, state approval of federally delegated programs typically contain threatening language regarding approval of the state program pending EPA's evaluation of that state's privilege/immunity law. EPA conditionally approved Colorado's air permitting program but included the following language in its approval. "If, during program implementation, EPA determines that this provision [referring to SB 94–139] interferes with Colorado's enforcement responsibilities under part 70, EPA will consider this grounds for withdrawing program approval in accordance with 40 CFR Section 70.10(c)." Utah also received EPA's admonition for passage of its privilege law in the approval of its air permit program which included similar language.

Most recently, EPA issued a memorandum establishing criteria for Clean Air Act Title V approvals entitled "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements." In this April 5, 1996 memorandum, Steven Herman, assistant Administrator states "[W]here a State privilege or immunity law deprives the state of adequate enforcement authority, as explained in these guidelines, it must be amended before final Title V approval can be granted." One of the conditions is that where a State "adopts a very broad privilege law, specifically directed at evidence related to environmental violations, that privilege could go so far as to render the overall State enforcement program inadequate even if other authorities (e.g., injunctive relief and penalties) were nominally available." Obviously, EPA intends to threaten States with privilege laws by withholding Title V approval until these States seek legislation modifying their laws to satisfy EPA. EPA has overstepped its bounds and federal legislation is needed to allow States to implement their laws without EPA interference.

Unfortunately, these threats are having a detrimental impact. While Colorado has had some success with companies coming forward and voluntarily disclosing instances of non-compliance to the Department, the threat of EPA overfiling is a constant fear for most companies considering utilizing Colorado's law. Certainly, most large companies in Colorado are not willing to come forward to voluntarily disclose for fear of being the "test case". Because these threats are having an impact, federal legislation is imperative so that states can feel free to pass and implement laws they believe are effective in improving environmental compliance in their states.

Companies favor legislation

Price Waterhouse LLP recently published The Voluntary Environmental Audit Survey of U.S. Business, dated March 1995. This survey was sponsored by the Coalition for Improved Environmental Audits, the Compliance Management and Policy Group, the Environmental Auditing Roundtable, and several companies. Three hun-

[1] Arkansas, Colorado, Idaho, Illinois, Indiana, Kansas, Kentucky, Michigan, Minnesota, Mississippi, New Hampshire, Oregon, South Dakota, Texas, Utah, Virginia, and Wyoming.

dred sixty nine large companies participated in the survey, covering a broad sector of industries. Some of the key findings of the survey include:

1. 64% of the respondents stated they would be encouraged to perform more audits if an enforcement policy eliminated penalties for self-identified, reported and corrected violations.

2. 49% of the respondents stated they would be encouraged to perform more audits if there were a federal privilege law in effect, and 42% if there were a state privilege law in effect.

3. Only 24% of the companies said they would be more encouraged to conduct audits if EPA issued a formal, definitive, and specific auditing guideline and protocol.

This survey demonstrates the need for federal legislation in order to encourage companies to voluntarily audit their facilities, identify problems, correct those problems and voluntarily disclose that information to the appropriate regulatory agency. Approximately 50% of these companies identified the need for federal legislation to encourage more auditing. While some companies felt that a formal, definitive specific EPA guidance or policy document may be helpful, EPA's Final Policy Statement is far from a definitive, formal guidance document.

STATUS OF COLORADO'S LAW

There have been fifteen to twenty voluntary disclosures under Colorado's law. While CACI believes this is a significant step in the right direction, that number would be even greater if it were not for threats made by EPA regarding overfiling and separate enforcement actions in states with laws such as Colorado's. Colorado has attracted particular interest from EPA, and as a result, there is heightened sensitivity by Colorado companies.

However, a number of companies has stepped forward to voluntarily disclose. These disclosures are of the types of violations that CACI expected would be disclosed as a result of this law. One involved an industrial boiler that had not been properly permitted. An initial meeting was held with the Department on October 7, 1994 and the entire matter was resolved by January 5, 1995. There have been several instances of acetone being disposed in sanitary sewers, practices that have since been discontinued. Possible past disposal of small amounts of solvent on the ground was also voluntarily disclosed. Based on investigatory work done by the facility, no evidence of a release was found at the site. Another disclosure relates to significant increases and decreases of emissions that may have occurred over the past several years, possibly requiring a construction permit. All of these violations were found as a result of voluntary audits.

The environment in Colorado has benefited by allowing these companies to voluntarily disclose instances of noncompliance, work cooperatively with the Department to resolve the problems, and obtain the appropriate permits or discontinue the inappropriate activities without fear of fines or penalties. CACI believes it is likely these instances would not have been discovered by the Department, the Department would not have been aware of these issues, and the corrections would possibly not have been implemented, without the protection of Colorado's environmental audit privilege and voluntary disclosure law. However, to gain even greater benefits, a federal law such as S582 is necessary.

OPPONENT'S RHETORIC AGAINST PRIVILEGE LAWS

Privilege laws are an impediment to enforcement

A common complaint about audit privilege laws by EPA, DOJ, some District Attorneys, some Attorneys General and environmental groups is that the lack of access to the audit report will hinder prosecution of environmental violations. This is simply untrue.

While S582 does provide a privilege for certain environmental audit reports, it is a qualified privilege. If a prosecutor demonstrates the self-evaluation was done fraudulently to avoid criminal prosecution, that audit report is not privileged. If a citizen or environmental group believes there is information in the audit report that is not subject to the privilege, a judge can allow the group access to the audit report. In other words, S582 identifies the appropriate scenarios when access to the information should be provided and the privilege is disallowed.

Further, S582 creates a privilege only for those documents meeting the definition of a voluntary self-evaluation which is a document created as a result of evaluating the company's environmental compliance. The privilege does not extend to documents required to be maintained by law, documents or information required to be reported by law, information discovered as a result of a typical enforcement action, or information learned from an independent source. Therefore, all of the currently existing mechanisms that are available to prosecutors, regulators and environ-

mental groups are still available under S582. It is difficult to understand how the creation of a privilege for documents that either are not routinely utilized by enforcement officials or that do not exist for fear that the information will be used against the company, changes the existing enforcement picture. EPA appears to be having no problem increasing the number of enforcement actions as well as the amount of penalties with its current authorities.

Economic benefit penalties are not appropriate for voluntary disclosures

CACI does not believe that EPA should be able to recover economic benefit penalties from companies that voluntarily disclose under provisions such as S582. Such penalties are inconsistent with the policy that supports voluntary disclosure as well as the policies that justify collection of the penalties themselves. However, EPA's Final Policy Statement requires the assessment of economic benefit penalties.

The theory behind economic benefit penalties is to recpature the economic value that a facility receives from delaying compliance with environmental regulation. *See e.g.,* 42 U.S.C. §7420(d) (economic benefit penalties under the Clean Air Act). EPA's stated goal in assessing economic benefit penalties is to negate a company's incentive to avoid compliance.

The goal of negating an economic incentive to avoid compliance is not relevant in cases of voluntary disclosure. Regulated entities that perform voluntary self-evaluations and then disclose their audits have clearly made a commitment to achieve compliance regardless of the cost. In performing the audit, a regulated entity incurs significant costs to identify areas of non-compliance. By voluntarily disclosing instances of noncompliance, it is stepping forward to work with regulators and, in doing so, is committing itself to funding what can be a very expensive effort to correct deficiencies. The period of time provided by S582 to achieve compliance is likely to drive costs even higher. If an entity's intention is to protect its cash flow, it would avoid doing the audit in the first place.

It is important to remember that S582 requires a company to discover the noncompliance through an environmental audit. The entity cannot have known about the violation and then voluntarily disclose the non-compliance. Since the company cannot have prior knowledge of its non-compliance, and was therefore unaware of any potential economic benefit, the punitive rationale regarding such penalties is not applicable to a voluntary disclosure under S582.

Tossing a company making a good faith effort to cooperate and achieve compliance into the quagmire of economic benefit calculations defeats the whole purpose of S582. It turns a new and innovative process that is intended to focus on environmental quality into contentious negotiations that, based on past experience, could drag on for a year or more. This creates the very uncertainty that discourages companies from conducting voluntary self-evaluations and voluntarily disclosing the results.

A look at EPA's efforts to turn the theory behind economic benefit penalties into practice supports this important concern. The BEN model that was developed by EPA to calculate economic benefit penalties is widely acknowledged to be flawed and has been the subject of a great deal of criticism and litigation. The American Automobile Manufacturers Association, American Forest and Paper Association, Chamber of Commerce of the United States, Chemical Manufacturers Association and National Association of Manufacturers filed a petition for rulemaking on October 25, 1994 concerning the use of the BEN Model in the recovery of economic benefit penalties in EPA enforcement proceedings. ("Rulemaking Petition"). Their Rulemaking Petition provides documentation that the "flaws in the BEN Model can substantially distort the penalties assessed in individual cases." The petition argues that the "discount rates used in the BEN Model can arbitrarily double the economic benefit computation." Rulemaking Petition, page 3. More specifically, the Rulemaking Petition states "the BEN Model has been faulted for the use of economically unjustified cost of capital rates to compound past savings forward, for the use of unsupported cost of capital rates for discounting cash flows and for its failure to reflect accurately changes in the tax laws." Rulemaking Petition, page 10. Additional concerns raised in the Rulemaking Petition relate to EPA's increasing pressure on states to use the BEN Model and the increased litigation that will inevitably result from use of this model.

Because S582 frees regulated entities from the fear of economic benefit penalties after voluntary disclosure, it encourages these companies to investigate their operations and make voluntary disclosures of noncompliance. At the same time, S582 does not shelter companies seeking a competitive advantage by failing to comply with the law. EPA can reach these recalcitrant companies through traditional enforcement measures that are available. Moreover, under S582, the immunity is lost unless the company discloses and corrects the noncompliance upon its discovery,

often a costly proposition. It does not protect a company that is aware it is operating out of compliance for a long period of time in order to gain a competitive edge. This is particularly true when the cost of coming into compliance within a relatively short period of time as required under S582 may be more expensive than any economic benefit gained by being out of compliance. As a result, economic benefit penalties are inappropriate under the voluntary disclosure immunity concept; they will only discourage companies from voluntarily complying with the law.

The litigation costs will not affect any agency enforcement efforts

Representatives from EPA and state enforcement agencies frequently assert privilege laws will greatly increase transaction costs for enforcement since they apparently believe privilege statutes will require the expenditure of considerable resources to litigate whether a piece of information is subject to the audit privilege or disclosure immunity. CACI respectfully disagrees with this view.

In expounding this view, the agency representatives attempt to have their enforcement cake and eat it too. They claim that they typically do not seek environmental audits or use voluntarily disclosed information in enforcement proceedings, but that enforcement would be devastated by audit privilege/immunity transaction costs. If these representatives truly have no "interest" in audits or voluntarily disclosed information, their enforcement activities would be based on other, readily available information; they should be able to proceed without incurring any additional transaction costs. Perhaps the agencies' concerns about transaction costs are indicative of their desire to obtain audits in enforcement after all. Perhaps these concerns demonstrate the need for laws like S582.

In addition, EPA's view of transaction costs is too narrow. It focuses on the transaction costs associated with an individual case that has already moved well into the enforcement stage. Self-evaluation privilege and voluntary disclosure laws, however, encourage every company to cooperate rather than litigate with the environmental agencies. The laws will achieve greater overall compliance while causing the enforcing agency to incur much lower transaction costs than traditional enforcement. If EPA would examine the transaction costs associated with achieving environmental compliance for the entire regulated community, it would find that the small potential increase in transaction costs in an individual case is far outweighed by the decrease in transaction costs in the multitude of cases that, because of laws like S582, will be quickly and cooperatively resolved.

CONCLUSION

At least seventeen states have determined environmental audit privilege and/or voluntary disclosure laws are an important tool to increase environmental quality and compliance in their states. However, for these states to effectively implement their laws, federal legislation like S582 is imperative. Without S582, EPA will continue to intimidate and threaten these states, essentially eliminating the benefits of their laws. Passage of S582 is required to provide these much needed incentives and protections at the federal level.

1994

SENATE BILL 94-139

BY SENATORS Meiklejohn, Johnson, Norton, Ament, Casey, Mutzebaugh, Owens, Tebedo, and Wattenberg;
also REPRESENTATIVES Foster, Acquafresca, Armstrong, Chlouber, George, Kerns, Morrison, Pankey, Reeser, Schauer, and Taylor.

CONCERNING ENVIRONMENTAL SELF-EVALUATION, AND, IN CONNECTION THEREWITH, CREATING AN ENVIRONMENTAL SELF-EVALUATION PRIVILEGE AND CREATING A PRESUMPTION AGAINST THE IMPOSITION OF ANY ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES FOR VOLUNTARY DISCLOSURES ARISING OUT OF ANY ENVIRONMENTAL SELF-EVALUATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Article 25 of title 13, Colorado Revised Statutes, 1987 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

13-25-126.5. Documents arising from environmental self-evaluation - admissibility in evidence. (1) THE GENERAL ASSEMBLY HEREBY FINDS AND DECLARES THAT PROTECTION OF THE ENVIRONMENT IS ENHANCED BY THE PUBLIC'S VOLUNTARY COMPLIANCE WITH ENVIRONMENTAL LAWS AND THAT THE PUBLIC WILL BENEFIT FROM INCENTIVES TO IDENTIFY AND REMEDY ENVIRONMENTAL COMPLIANCE ISSUES. IT IS FURTHER DECLARED THAT LIMITED EXPANSION OF THE PROTECTION AGAINST DISCLOSURE WILL ENCOURAGE SUCH VOLUNTARY COMPLIANCE AND IMPROVE ENVIRONMENTAL QUALITY AND THAT THE VOLUNTARY PROVISIONS OF THIS ACT WILL NOT INHIBIT THE EXERCISE OF THE REGULATORY AUTHORITY BY THOSE ENTRUSTED WITH PROTECTING OUR ENVIRONMENT.

(2) FOR THE PURPOSES OF THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

Capital letters indicate new material added to existing ***

(a) "ADMINISTRATIVE LAW JUDGE" MEANS ANY PERSON APPOINTED TO BE AN ADMINISTRATIVE LAW JUDGE PURSUANT TO PART 10 OF ARTICLE 30 OF TITLE 24, C.R.S.

(b) "ENVIRONMENTAL AUDIT REPORT" MEANS ANY DOCUMENT, INCLUDING ANY REPORT, FINDING, COMMUNICATION, OR OPINION OR ANY DRAFT OF A REPORT, FINDING, COMMUNICATION, OR OPINION, RELATED TO AND PREPARED AS A RESULT OF A VOLUNTARY SELF-EVALUATION THAT IS DONE IN GOOD FAITH.

(c) "ENVIRONMENTAL LAW" MEANS ANY REQUIREMENT CONTAINED IN ARTICLES 7, 8, 11, 15, AND 18 OF TITLE 25, C.R.S., OR ARTICLE 20 OF TITLE 30, C.R.S., IN REGULATIONS PROMULGATED UNDER SUCH PROVISIONS, OR IN ANY ORDERS, PERMITS, LICENSES, OR CLOSURE PLANS UNDER SUCH PROVISIONS.

(d) "IN CAMERA REVIEW" MEANS A HEARING OR REVIEW IN A COURTROOM, HEARING ROOM, OR CHAMBERS TO WHICH THE GENERAL PUBLIC IS NOT ADMITTED. AFTER SUCH HEARING OR REVIEW, THE CONTENT OF THE ORAL AND OTHER EVIDENCE AND STATEMENTS OF THE JUDGE AND COUNSEL SHALL BE HELD IN CONFIDENCE BY THOSE PARTICIPATING IN OR PRESENT AT THE HEARING OR REVIEW, AND ANY TRANSCRIPT OF THE HEARING OR REVIEW SHALL BE SEALED AND NOT CONSIDERED A PUBLIC RECORD, UNTIL AND UNLESS ITS CONTENTS ARE DISCLOSED BY A COURT OR ADMINISTRATIVE LAW JUDGE HAVING JURISDICTION OVER THE MATTER.

(e) "VOLUNTARY SELF-EVALUATION" MEANS A SELF-INITIATED ASSESSMENT, AUDIT, OR REVIEW, NOT OTHERWISE EXPRESSLY REQUIRED BY ENVIRONMENTAL LAW, THAT IS PERFORMED BY ANY PERSON OR ENTITY, FOR ITSELF, EITHER BY AN EMPLOYEE OR EMPLOYEES EMPLOYED BY SUCH PERSON OR ENTITY WHO ARE ASSIGNED THE RESPONSIBILITY OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW OR BY A CONSULTANT ENGAGED BY SUCH PERSON OR ENTITY EXPRESSLY AND SPECIFICALLY FOR THE PURPOSE OF PERFORMING SUCH ASSESSMENT, AUDIT, OR REVIEW TO DETERMINE WHETHER SUCH PERSON OR ENTITY IS IN COMPLIANCE WITH ENVIRONMENTAL LAWS. ONCE INITIATED, SUCH VOLUNTARY SELF-EVALUATION SHALL BE COMPLETED WITHIN A REASONABLE PERIOD OF TIME. NOTHING IN THIS SECTION SHALL BE CONSTRUED TO AUTHORIZE UNINTERRUPTED VOLUNTARY SELF-EVALUATIONS.

(3) AN ENVIRONMENTAL AUDIT REPORT IS PRIVILEGED AND IS NOT ADMISSIBLE IN ANY LEGAL ACTION OR ADMINISTRATIVE PROCEEDING AND IS NOT SUBJECT TO ANY DISCOVERY PURSUANT TO THE RULES OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, OR ADMINISTRATIVE PROCEDURE, UNLESS:

(a) THE ENTITY OR PERSON FOR WHOM THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED, WHETHER THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED BY THE ENTITY OR BY A CONSULTANT HIRED BY THE ENTITY, WAIVES THE PRIVILEGE UNDER THIS SECTION;

(b) (I) A COURT OF RECORD, OR, PURSUANT TO SECTION

24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT:

(A) THE ENVIRONMENTAL AUDIT REPORT SHOWS EVIDENCE THAT THE PERSON OR ENTITY FOR WHICH THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED IS NOT OR WAS NOT IN COMPLIANCE WITH AN ENVIRONMENTAL LAW; AND

(B) THE PERSON OR ENTITY DID NOT INITIATE APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE ANY NECESSARY PERMIT APPLICATION PROMPTLY AFTER THE NONCOMPLIANCE WITH THE ENVIRONMENTAL LAW WAS DISCOVERED AND, AS A RESULT, THE PERSON OR ENTITY DID NOT OR WILL NOT ACHIEVE COMPLIANCE WITH THE ENVIRONMENTAL LAW OR COMPLETE THE NECESSARY PERMIT APPLICATION WITHIN A REASONABLE AMOUNT OF TIME.

(II) FOR THE PURPOSES OF THIS PARAGRAPH (b) ONLY, IF THE EVIDENCE SHOWS NONCOMPLIANCE BY A PERSON OR ENTITY WITH MORE THAN ONE ENVIRONMENTAL LAW, THE PERSON OR ENTITY MAY DEMONSTRATE THAT APPROPRIATE EFFORTS TO ACHIEVE COMPLIANCE WERE OR ARE BEING TAKEN BY INSTITUTING A COMPREHENSIVE PROGRAM THAT ESTABLISHES A PHASED SCHEDULE OF ACTIONS TO BE TAKEN TO BRING THE PERSON OR ENTITY INTO COMPLIANCE WITH ALL OF SUCH ENVIRONMENTAL LAWS.

(c) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT COMPELLING CIRCUMSTANCES EXIST THAT MAKE IT NECESSARY TO ADMIT THE ENVIRONMENTAL AUDIT REPORT INTO EVIDENCE OR THAT MAKE IT NECESSARY TO SUBJECT THE ENVIRONMENTAL AUDIT REPORT TO DISCOVERY PROCEDURES;

(d) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE PRIVILEGE IS BEING ASSERTED FOR A FRAUDULENT PURPOSE OR THAT THE ENVIRONMENTAL AUDIT REPORT WAS PREPARED TO AVOID DISCLOSURE OF INFORMATION IN AN INVESTIGATIVE, ADMINISTRATIVE, OR JUDICIAL PROCEEDING THAT WAS UNDERWAY, THAT WAS IMMINENT, OR FOR WHICH THE ENTITY OR PERSON HAD BEEN PROVIDED WRITTEN NOTIFICATION THAT AN INVESTIGATION INTO A SPECIFIC VIOLATION HAD BEEN INITIATED; OR

(e) A COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., AN ADMINISTRATIVE LAW JUDGE, AFTER AN IN CAMERA REVIEW, DETERMINES THAT THE INFORMATION CONTAINED IN THE ENVIRONMENTAL AUDIT REPORT DEMONSTRATES A CLEAR, PRESENT, AND IMPENDING DANGER TO THE PUBLIC HEALTH OR THE ENVIRONMENT IN AREAS OUTSIDE OF THE FACILITY PROPERTY.

(4) THE SELF-EVALUATION PRIVILEGE CREATED BY THIS SECTION DOES NOT APPLY TO:

(a) DOCUMENTS OR INFORMATION REQUIRED TO BE DEVELOPED,

MAINTAINED, OR REPORTED PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(b) DOCUMENTS OR OTHER INFORMATION REQUIRED TO BE AVAILABLE OR FURNISHED TO A REGULATORY AGENCY PURSUANT TO ANY ENVIRONMENTAL LAW OR ANY OTHER LAW OR REGULATION;

(c) INFORMATION OBTAINED BY A REGULATORY AGENCY THROUGH OBSERVATION, SAMPLING, OR MONITORING;

(d) INFORMATION OBTAINED THROUGH ANY SOURCE INDEPENDENT OF THE ENVIRONMENTAL AUDIT REPORT OR ANY PERSON COVERED UNDER SECTION 13-90-107 (1) (j) (I) (A), C.R.S.;

(e) DOCUMENTS EXISTING PRIOR TO THE COMMENCEMENT OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION;

(f) DOCUMENTS PREPARED SUBSEQUENT TO THE COMPLETION OF AND INDEPENDENT OF THE VOLUNTARY SELF-EVALUATION; OR

(g) ANY INFORMATION, NOT OTHERWISE PRIVILEGED, INCLUDING THE PRIVILEGE CREATED BY THIS SECTION, THAT IS DEVELOPED OR MAINTAINED IN THE COURSE OF REGULARLY CONDUCTED BUSINESS ACTIVITY OR REGULAR PRACTICE.

(5) (a) UPON A SHOWING BY ANY PARTY, BASED UPON INDEPENDENT KNOWLEDGE, THAT PROBABLE CAUSE EXISTS TO BELIEVE THAT AN EXCEPTION TO THE SELF-EVALUATION PRIVILEGE UNDER SUBSECTION (3) OF THIS SECTION IS APPLICABLE TO AN ENVIRONMENTAL AUDIT REPORT OR THAT THE PRIVILEGE DOES NOT APPLY TO THE ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF SUBSECTION (4) OF THIS SECTION, THEN A COURT OF RECORD OR, PURSUANT TO SECTION 24-4-105, C.R.S., ANY ADMINISTRATIVE LAW JUDGE, MAY ALLOW SUCH PARTY LIMITED ACCESS TO THE ENVIRONMENTAL AUDIT REPORT FOR THE PURPOSES OF AN IN CAMERA REVIEW ONLY. THE COURT OF RECORD OR THE ADMINISTRATIVE LAW JUDGE MAY GRANT SUCH LIMITED ACCESS TO ALL OR PART OF THE ENVIRONMENTAL AUDIT REPORT UNDER THE PROVISIONS OF THIS SUBSECTION (5) UPON SUCH CONDITIONS AS MAY BE NECESSARY TO PROTECT THE CONFIDENTIALITY OF THE ENVIRONMENTAL AUDIT REPORT. A MOVING PARTY WHO OBTAINS ACCESS TO AN ENVIRONMENTAL AUDIT REPORT PURSUANT TO THE PROVISIONS OF THIS SUBSECTION (5) MAY NOT DIVULGE ANY INFORMATION FROM THE REPORT EXCEPT AS SPECIFICALLY ALLOWED BY THE COURT OR ADMINISTRATIVE LAW JUDGE.

(b) (I) IF ANY PARTY DIVULGES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5) OR IF ANY OTHER PERSON OR ENTITY KNOWINGLY DIVULGES OR DISSEMINATES ALL OR ANY PART OF THE INFORMATION CONTAINED IN AN ENVIRONMENTAL AUDIT REPORT THAT WAS PROVIDED TO SUCH PERSON OR ENTITY IN VIOLATION OF THE PROVISIONS OF PARAGRAPH (a) OF THIS SUBSECTION (5), SUCH PARTY OR OTHER PERSON OR ENTITY IS LIABLE FOR

PREPARATION OF THE ENVIRONMENTAL AUDIT REPORT, OR ANY CONSULTANT WHO IS HIRED FOR THE PURPOSE OF PERFORMING THE VOLUNTARY SELF-EVALUATION FOR THE PERSON OR ENTITY MAY NOT BE EXAMINED AS TO THE VOLUNTARY SELF-EVALUATION OR ENVIRONMENTAL AUDIT REPORT WITHOUT THE CONSENT OF THE PERSON OR ENTITY, OR UNLESS ORDERED TO DO SO BY ANY COURT OF RECORD, OR, PURSUANT TO SECTION 24-4-105, C.R.S., BY AN ADMINISTRATIVE LAW JUDGE. FOR THE PURPOSES OF THIS PARAGRAPH (j), "VOLUNTARY SELF-EVALUATION" AND "ENVIRONMENTAL AUDIT REPORT" HAVE THE MEANINGS PROVIDED FOR THE TERMS IN SECTION 13-25-126.5 (2).

(B) THIS PARAGRAPH (j) DOES NOT APPLY IF THE VOLUNTARY SELF-EVALUATION IS SUBJECT TO AN EXCEPTION ALLOWING ADMISSION INTO EVIDENCE OR DISCOVERY PURSUANT TO THE PROVISIONS OF SECTION 13-25-126.5 (3) OR (4).

(II) THIS PARAGRAPH (j) APPLIES ONLY TO VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 3. Part 1 of article 1 of title 25, Colorado Revised Statutes, 1989 Repl. Vol., as amended, is amended BY THE ADDITION OF A NEW SECTION to read:

25-1-114.5. Voluntary disclosure arising from self-evaluation - presumption against imposition of administrative, civil, or criminal penalties. (1) FOR THE PURPOSES OF THIS SECTION, A DISCLOSURE OF INFORMATION BY A PERSON OR ENTITY TO ANY DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH REGARDING ANY INFORMATION RELATED TO AN ENVIRONMENTAL LAW IS VOLUNTARY IF ALL OF THE FOLLOWING ARE TRUE:

(a) THE DISCLOSURE IS MADE PROMPTLY AFTER KNOWLEDGE OF THE INFORMATION DISCLOSED IS OBTAINED BY THE PERSON OR ENTITY;

(b) THE DISCLOSURE ARISES OUT OF A VOLUNTARY SELF-EVALUATION;

(c) THE PERSON OR ENTITY MAKING THE DISCLOSURE INITIATES THE APPROPRIATE EFFORT TO ACHIEVE COMPLIANCE, PURSUES COMPLIANCE WITH DUE DILIGENCE, AND CORRECTS THE NONCOMPLIANCE WITHIN TWO YEARS AFTER THE COMPLETION OF THE VOLUNTARY SELF-EVALUATION. WHERE SUCH EVIDENCE SHOWS THE NONCOMPLIANCE IS THE FAILURE TO OBTAIN A PERMIT, APPROPRIATE EFFORTS TO CORRECT THE NONCOMPLIANCE MAY BE DEMONSTRATED BY THE SUBMITTAL OF A COMPLETE PERMIT APPLICATION WITHIN A REASONABLE TIME.

(d) THE PERSON OR ENTITY MAKING THE DISCLOSURE COOPERATES WITH THE APPROPRIATE DIVISION OR AGENCY IN THE DEPARTMENT OF HEALTH REGARDING INVESTIGATION OF THE ISSUES IDENTIFIED IN THE DISCLOSURE.

(2) FOR THE PURPOSES OF PARAGRAPH (c) OF SUBSECTION (1) OF THIS SECTION, UPON APPLICATION TO AND AT THE DISCRETION OF THE DEPARTMENT OF HEALTH, THE TIME PERIOD WITHIN WHICH THE NONCOMPLIANCE IS REQUIRED TO BE CORRECTED MAY BE EXTENDED IF IT IS NOT PRACTICABLE TO CORRECT THE NONCOMPLIANCE WITHIN THE TWO-YEAR PERIOD. A REQUEST FOR A DE NOVO REVIEW OF THE DECISION OF THE DEPARTMENT OF HEALTH MAY BE MADE TO THE APPROPRIATE DISTRICT COURT OR ADMINISTRATIVE LAW JUDGE.

(3) IF A PERSON OR ENTITY IS REQUIRED TO MAKE A DISCLOSURE TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH UNDER A SPECIFIC PERMIT CONDITION OR UNDER AN ORDER ISSUED BY THE DIVISION OR AGENCY, THEN THE DISCLOSURE IS NOT VOLUNTARY WITH RESPECT TO THAT DIVISION OR AGENCY.

(4) IF ANY PERSON OR ENTITY MAKES A VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION TO A DIVISION OR AGENCY WITHIN THE DEPARTMENT OF HEALTH, THEN THERE IS A REBUTTABLE PRESUMPTION THAT THE DISCLOSURE IS VOLUNTARY AND THEREFORE THE PERSON OR ENTITY IS IMMUNE FROM ANY ADMINISTRATIVE AND CIVIL PENALTIES ASSOCIATED WITH THE ISSUES DISCLOSED AND IS IMMUNE FROM ANY CRIMINAL PENALTIES FOR NEGLIGENT ACTS ASSOCIATED WITH THE ISSUES DISCLOSED. THE PERSON OR ENTITY SHALL PROVIDE INFORMATION SUPPORTING ITS CLAIM THAT THE DISCLOSURE IS VOLUNTARY AT THE TIME THAT THE DISCLOSURE IS MADE TO THE DIVISION OR AGENCY.

(5) TO REBUT THE PRESUMPTION THAT A DISCLOSURE IS VOLUNTARY, THE APPROPRIATE DIVISION OR AGENCY SHALL SHOW TO THE SATISFACTION OF THE RESPECTIVE COMMISSION IN THE DEPARTMENT OF HEALTH OR THE STATE BOARD OF HEALTH, IF NO RESPECTIVE COMMISSION EXISTS, THAT THE DISCLOSURE WAS NOT VOLUNTARY BASED UPON THE FACTORS SET FORTH IN SUBSECTIONS (1), (2), AND (3) OF THIS SECTION. A DECISION BY THE COMMISSION OR THE STATE BOARD OF HEALTH, WHICHEVER IS APPROPRIATE, REGARDING THE VOLUNTARY NATURE OF A DISCLOSURE IS FINAL AGENCY ACTION. THE DIVISION OR AGENCY MAY NOT INCLUDE ANY ADMINISTRATIVE OR CIVIL PENALTY OR FINE OR ANY CRIMINAL PENALTY OR FINE FOR NEGLIGENT ACTS IN A NOTICE OF VIOLATION OR IN A CEASE AND DESIST ORDER ON ANY UNDERLYING ENVIRONMENTAL VIOLATION THAT IS ALLEGED ABSENT A FINDING BY THE RESPECTIVE COMMISSION OR THE STATE BOARD OF HEALTH THAT THE DIVISION OR AGENCY HAS REBUTTED THE PRESUMPTION OF VOLUNTARINESS OF THE DISCLOSURE. THE BURDEN TO REBUT THE PRESUMPTION OF VOLUNTARINESS IS ON THE DIVISION OR AGENCY.

(6) THE ELIMINATION OF ADMINISTRATIVE, CIVIL, OR CRIMINAL PENALTIES UNDER THIS SECTION DOES NOT APPLY IF A PERSON OR ENTITY HAS BEEN FOUND BY A COURT OR ADMINISTRATIVE LAW JUDGE TO HAVE COMMITTED SERIOUS VIOLATIONS THAT CONSTITUTE A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS OF ENVIRONMENTAL LAWS, RULES, REGULATIONS, PERMIT CONDITIONS, SETTLEMENT AGREEMENTS, OR ORDERS ON CONSENT AND THAT WERE DUE TO SEPARATE AND DISTINCT EVENTS GIVING RISE TO THE VIOLATIONS, WITHIN THE THREE-YEAR PERIOD PRIOR

TO THE DATE OF THE DISCLOSURE. SUCH A PATTERN OF CONTINUOUS OR REPEATED VIOLATIONS MAY ALSO BE DEMONSTRATED BY MULTIPLE SETTLEMENT AGREEMENTS RELATED TO SUBSTANTIALLY THE SAME ALLEGED VIOLATIONS CONCERNING SERIOUS INSTANCES OF NONCOMPLIANCE WITH ENVIRONMENTAL LAWS THAT OCCURRED WITHIN THE THREE-YEAR PERIOD IMMEDIATELY PRIOR TO THE DATE OF THE VOLUNTARY DISCLOSURE.

(7) EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION, THIS SECTION DOES NOT AFFECT ANY AUTHORITY THE DEPARTMENT OF HEALTH HAS TO REQUIRE ANY ACTION ASSOCIATED WITH THE INFORMATION DISCLOSED IN ANY VOLUNTARY DISCLOSURE OF AN ENVIRONMENTAL VIOLATION.

(8) UNLESS THE CONTEXT OTHERWISE REQUIRES, THE DEFINITIONS CONTAINED IN SECTION 13-25-126.5 (2), C.R.S., APPLY TO THIS SECTION.

(9) THIS SECTION APPLIES ONLY TO VOLUNTARY DISCLOSURES THAT ARE MADE AND VOLUNTARY SELF-EVALUATIONS THAT ARE PERFORMED DURING THE PERIOD BEGINNING ON THE EFFECTIVE DATE OF THIS ACT AND ENDING JUNE 30, 1999.

SECTION 4. Effective date - applicability. This act shall take effect upon passage and shall apply to all legal actions and administrative proceedings commenced on or after said date.

SECTION 5. No appropriation. The general assembly has determined that this act can be implemented within existing appropriations, and therefore no separate appropriation of state moneys is necessary to carry out the purposes of this act.

SECTION 6. Safety clause. The general assembly hereby

finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Tom Norton
PRESIDENT OF
THE SENATE

Charles E. Berry
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Joan M. Albi
SECRETARY OF
THE SENATE

Judith M. Rodrigue
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

APPROVED June 1, 1994 at 1:28 p.m.

Roy Romer
GOVERNOR OF THE STATE OF COLORADO

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB - 3 1995

OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE

Peter W. Schmidt
Director
Department of Environmental Quality
629 East Main St.
Richmond, VA 23219

Dear Mr. Schmidt:

I am writing to express EPA's opposition to the environmental privilege/immunity legislation that is currently under consideration in Virginia (House Bill 1845). Our concerns include the following:

1. The bill appears to immunize criminal conduct and could therefore frustrate legitimate efforts to detect and appropriately punish reckless and intentional acts that often result in severe harm to people or the environment.

2. The bill would encourage increased litigation, further burdening our already taxed judicial system. Increased litigation should be expected, for example, over efforts to use the law to shield information associated with non-discrete, routine activities that are characterized as "compliance evaluations" simply to evade disclosure. This kind of litigation will drain government and private resources and in some cases prevent quick action to address serious environmental emergencies, despite the exception for emergencies.

3. The bill contains overly broad definitions of key terms, such as "environmental assessment" and "document." As a result, this audit privilege, unlike any other privilege (e.g., the attorney-client and work product privileges), appears to protect the facts underlying protected documents -- facts that may be crucial in holding polluters accountable for their actions.

4. Although incentives for voluntary disclosure are a good idea, the penalty immunity provision in the proposed legislation will "unlevel the playing field" by

2

allowing violators to keep the economic benefit they gained through noncompliance, working to the disadvantage of their law-abiding competitors.

As you may know, Administrator Browner asked the Office of Enforcement and Compliance Assurance last May to reassess EPA's environmental auditing policy to see if we needed new incentives to encourage voluntary disclosures and prompt correction of violations uncovered in environmental audits. Attached are copies of correspondence between the U.S. Congress and Administrator Browner describing our inclusive reassessment process. As the letters indicate, we plan to complete our reassessment in the very near future.

On January 18-20, we held a series of meetings in San Francisco in which EPA presented options to a focus group that included representatives from industry, state environmental commissions and attorneys general's offices, district attorneys' offices and environmental groups. We did not seek or expect consensus from the group. Nonetheless, we heard support from all the interests represented at the meeting -- including industry -- for a national policy based on penalty mitigation for violations that are voluntarily disclosed and promptly corrected.

If Virginia constrains its enforcement efforts through this legislation, we foresee the need emerging for increased federal enforcement in your State, particularly in circumstances in which application of the proposed law leaves a crime or serious violation unpunished or a significant violator with a large economic benefit; the law is used to shield information associated with routine compliance monitoring activities that are characterized as "compliance evaluations" simply to evade disclosure; or the law is applied in a way that shields violations that are not promptly corrected.

My staff has raised these concerns with your Enforcement Director, Harry Kelso, and we remain available to discuss these issues more fully. I strongly urge Virginia not to enact the above-referenced audit privilege/immunity legislation. In my view, it will do more harm than good.

Sincerely yours,

Steven A. Herman
Assistant Administrator

COMMONWEALTH of VIRGINIA
DEPARTMENT OF ENVIRONMENTAL QUALITY

Peter W. Schmidt
Director

P. O. Box 10009
Richmond, Virginia 23240-0009
(804) 762-4000

February 4, 1995

Mr. Steven A. Herman
Assistant Administrator
Office of Enforcement and Compliance Assessment
U.S. Environmental Protection Agency
Washington, D.C. 20460

Dear Mr. Herman:

Thank you for your February 3, 1995, letter regarding the environmental assessment legislation currently under consideration by Virginia's General Assembly. We have examined the concerns outlined in your letter, and we believe that they are, in the main, groundless. We were disappointed that you chose to focus on exceedingly unlikely possibilities and legalistic concerns, while ignoring the very real likelihood that this legislation will lead to environmental improvements which would otherwise be complicated and retarded by the current regulatory regime.

Beyond these considerations, it is inappropriate and unfortunate that the Environmental Protection Agency has decided to involve itself in the legislative decisions of the Commonwealth. The EPA ought to avoid unwarranted intrusions, like this one, into matters which concern individual states alone.

Please be advised that we have shared your letter with both our General Assembly and our Congressional delegation.

Very truly yours,

Peter W. Schmidt
Director

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 13 1995

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Peter W. Schmidt
Director
Department of Environmental Quality
629 East Main Street
Richmond, Virginia 23219

Dear Mr. Schmidt:

Thank you for your February 3, 1995, response to my earlier letter regarding environmental audit privilege/immunity legislation pending in Virginia. I understand that both houses of the Virginia legislature have passed versions of this legislation. Unfortunately, I am aware of no changes in either version of the legislation that satisfy all of the concerns I raised in my letter to you.

Your view that federal policies preclude voluntary assessment activities is contrary to a wealth of evidence we have reviewed during our extensive reassessment of our auditing policy. While I share your interest in promoting voluntary self-evaluations of environmental compliance, I remain concerned that the Virginia legislature is poised to act in this area without the benefit of a careful empirical look at auditing activities in the regulated community and at actual state and federal enforcement policies and practices, and without thoughtful consideration of alternatives that would minimize the concerns in my letter.

I encourage the Commonwealth of Virginia to take the time necessary to develop a more sound approach in this complicated area.

Sincerely yours,

Steven A. Herman
Assistant Administrator

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
JOHN F. KENNEDY FEDERAL BUILDING
BOSTON, MASSACHUSETTS 02203-0001

February 27, 1996

Honorable Stephen Merrill
Governor
State of New Hampshire
State House
Concord, New Hampshire 03301

Dear Governor Merrill:

I am writing to express the United States Environmental Protection Agency's opposition to the environmental audit privilege and penalty immunity bill, House Bill 275, currently pending in the New Hampshire legislature. As will be explained more fully in this letter, U.S. EPA does not support this bill because it establishes impediments to compliance, severely restricts the dissemination of environmental information which may disclose significant human health and environmental impacts, immunizes certain criminal behavior from prosecution, and encourages litigation over the scope of the stated privileges and immunities.

The results of several recent studies demonstrate that environmental audits are being conducted in significant numbers and that the results of such audits are not being used to initiate enforcement actions against the regulated community, thus raising serious questions concerning the necessity of this type of legislation. As an alternative to environmental audit privilege and immunity legislation, U.S. EPA encourages states to enact policies which provide (1) incentives for companies to audit, disclose, and correct violations and (2) greater certainty regarding the potential for and/or extent of enforcement. Under a recently adopted policy (copy enclosed), EPA has established enforcement and penalty mitigation criteria which will be applied to those regulated entities which voluntarily discover, disclose, correct, and prevent violations. We believe this approach will help to ensure compliance with environmental regulations and will enhance working relationships between the regulated community and administrative agencies. See U.S. EPA's "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 60 Fed. Reg. 66706 (December 22, 1995).

Federal and state coordination is essential to maintain consistency in the enforcement of environmental laws throughout the country. The U.S. EPA is required to establish a certain

minimum consistency in federal enforcement so that the sanctions a business or other regulated entity faces for violating environmental laws do not depend on where the business or other entity is located. Accordingly, the U.S. EPA hopes that states will also strive for a similar national baseline consistency in legislation and enforcement practices, so that "pollution havens" do not result from states attempting to attract business and industry through the enactment of lenient environmental laws. As always, states are encouraged to experiment with different approaches that do not jeopardize the fundamental national interest in assuring that violations of federal law do not threaten the public health or the environment, or make it profitable not to comply.

U.S. EPA has concerns with both the privilege and immunity portions of New Hampshire House Bill 275. The Agency does not support an environmental audit privilege for a number of reasons, including the following: 1) the need for an audit privilege has not been established; 2) the proposed privilege will not necessarily result in any significant increase in voluntary auditing and compliance; 3) it promotes secrecy by allowing companies to withhold important environmental data from law enforcement agencies and the local public; 4) it complicates investigations and criminal prosecutions; 5) it may protect facts and not just legal conclusions; and 6) policies, such as those adopted by EPA, eliminate the need for any privilege as against the government.

The Agency also has concerns over the immunity provisions of the bill which provides immunity from <u>any</u> administrative, civil, or criminal penalty action for negligent acts or omissions if the person voluntarily discloses such violations(s) to the appropriate agency. Further immunized are acts or omissions that present an imminent and substantial endangerment to human health or the environment or which violate the specific terms of a judicial or administrative order or consent agreement. Moreover, the immunity provisions allow regulated entities to benefit economically from their non-compliance, thereby gaining an unfair advantage over their competitors. Finally, unlike most other states' immunity provisions, House Bill 275 immunizes violations that are required by law to be disclosed.

The U.S. EPA recognizes that the states are important partners in federal enforcement and compliance assurance and assistance. The Agency respects the states' rights to be autonomous and innovative in developing environmental enforcement programs, but we are concerned about potential conflicts between House Bill 275 and federal law. As presently drafted, the bill may seriously compromise the state's ability to enforce against violations of federal environmental law delegated to the state for implementation. If the bill does move forward, we hope it can be amended to reflect that it will not apply to federally delegated programs with more stringent federal requirements. Some states, like Wyoming, South Dakota and Virginia, have explicitly

recognize the primacy of federal environmental law by stating that their immunity provisions do not apply if they are inconsistent with the federal requirements to maintain a delegated state program. The Agency reserves its right to perform its statutory duty to protect public health or the environment from violations of federal law where necessary, including in New Hampshire.

I strongly urge New Hampshire not to enact the proposed audit privilege and penalty immunity legislation. My staff and I are available to discuss these matters.

Sincerely,

John P. DeVillars
Regional Administrator

STATE OF NEW HAMPSHIRE

STEPHEN MERRILL
GOVERNOR

OFFICE OF THE GOVERNOR

March 15, 1996

John P. DeVillars
Regional Administrator
U.S. Environmental
Protection Agency
John F. Kennedy Federal Bldg.
Boston, MA 02203-0001

Dear Mr. DeVillars:

I have read your letter of opposition to HB 275 regarding voluntary environmental self-audits. This legislation provides an incentive to encourage businesses to conduct voluntary self-audits of environmental compliance by establishing a privilege for such reports and by providing an opportunity for businesses to work with regulators to correct problems discovered by the audit. I was surprised by the tone of the letter and I must candidly tell you that the measure ostensibly criticized in your letter bears little resemblance to the bill actually passed by the New Hampshire Legislature.

I am sure your contact with New Hampshire has assured you that our State will never sacrifice its environmental health to become a "pollution haven" as you suggest. We are one of the top recipients of the coveted Gold and Green awards, which recognizes a state's efforts in combining environmental stewardship with economic growth. We are very proud of that designation. New Hampshire wishes to encourage innovation and cooperation between regulators and the business community to better protect our environment and to continue our economic growth. To do so, New Hampshire will continue to develop creative ways to solve issues we face whether or not the federal government mirrors that cooperative approach. HB 275 is just one example of our efforts to make government more responsive. I fully intend to sign the bill once it reaches my desk.

Your letter does not reflect the fact that HB 275 resulted from a collaborative effort between the business community, environmental interests and government officials. The Legislature worked diligently with those interested parties to devise an innovative process that encourages businesses to curb pollution and that provides them an incentive to work with State regulators, not against

them. As a result, I believe the Legislature has devised a plan that should result in even higher levels of compliance and innovation. I am proud of their achievement and I suggest that, instead of criticizing them for diverging from the federal model, the EPA join me in supporting their efforts.

My analysis of HB 275 differs sharply from that of the EPA on several issues. First, you state that HB 275 "establishes impediments to compliance" with environmental regulations. In fact, the legislation expressly states that evidence of noncompliance will strip the company of any privilege it would have otherwise gained by performing a voluntary audit.

Second, your letter states that the bill "severely restricts the dissemination of environmental information." Nothing in the bill provides for such restriction. All information that is otherwise required to be reported must still be reported and information obtained by the Department of Environmental Services or any other regulatory agency will not be privileged. Only the audit report, which may well not have been prepared but for this legislation, will be privileged. Even then, data, documents or other information developed in the normal course of regular business remains unprivileged, regardless of whether that information ultimately ends up in the audit report.

Third, your letter states that the bill "immunizes criminal behavior." That serious allegation is not correct. I am troubled by the implication that the EPA believes New Hampshire state government would jeopardize the health of our citizens by ignoring criminal behavior. As a former Attorney General I am frankly offended by such a suggestion. In fact, the bill specifically states that no company shall be immune from any criminal acts committed, whether those acts are committed knowingly, purposefully or recklessly. The bill offers an incentive to businesses, if the businesses are willing to conduct voluntary environmental audits, and to voluntarily correct any previously unknown environmental problems that the audit uncovers.

Fourth, the EPA expresses the concern that the bill "encourages litigation." I disagree. While any new law may be tested in court, we can...t be deterred in our efforts to accomplish serious regulatory reform because of threats of suit. This bill is specifically designed to foster cooperation among the business community,

regulators, lawmakers and environmental interest groups. I will assure that the law has an opportunity to succeed in New Hampshire and that we continue our path toward making government more business friendly. Perhaps meaningful tort reform at the federal level will help to allay EPA's concern about unnecessary litigation.

Finally, I reject the suggestion that states like New Hampshire must "recognize the primacy of federal law" in order to successfully design and implement effective environmental laws. In fact, states have proven time and time again that the federal government does not know best and does not get the job done for the citizens of the several states. I hope that by that comment the EPA does not intend to minimize the independent sovereign rights of states to adopt and enforce environmental laws that protect our environment and add to our quality of life.

The goals of the New Hampshire audit legislation and of EPA's environmental policy are the same: to encourage businesses to adopt a new way of protecting the environment through environmentally sound conduct, while punishing those who persist in conduct threatening human health and the environment. New Hampshire has proven it is willing and capable of protecting the environment and doing so in an efficient and creative manner. We would prefer to work toward that goal with, and not despite, the efforts of the federal government.

I believed that the EPA would welcome new, innovative initiatives instead of defending the status quo. I am confident that given the opportunity, New Hampshire will lead the country in the environmental area as it has in welfare reform and economic development.

Very truly yours,

Stephen Merrill
Governor

Congress of the United States
House of Representatives
Washington, DC 20515

May 16, 1996

The Honorable Albert Gore
Vice President of the United States
Washington, D.C. 20510

Dear Vice President Gore:

Our national debate on reforming the environmental regulatory system is at a crossroads. Your leadership in moving our nation toward a system in which creative and cost effective responses to environmental problems flourish and incentives for responsible stewardship and pollution abatement are reinforced, has been invaluable in this debate. We share your commitment. To further our mutual goal, we ask for your support of state and federal legislation to encourage the regulated community to self-monitor their compliance with environmental regulations. We think this concept is a critical aspect of environmentalism in the 21st century.

Twenty-five years of environmental law has brought great gains in pollution reduction but has also resulted in a bewildering, complicated and often conflicting system of regulation. More and more companies use environmental audit programs as a tool to ensure compliance, with this complex system. Encouraging this trend by making it easier to conduct audits could reap huge rewards--higher environmental quality from increased cooperation between the regulated community and regulators, greater focus on bad actor companies, and more efficient use of limited government enforcement resources. However, many businesses conduct very limited audits or none at all, for fear the information will be used against them in enforcement actions and/or third party litigation. This threat has undermined the usefulness of environmental auditing.

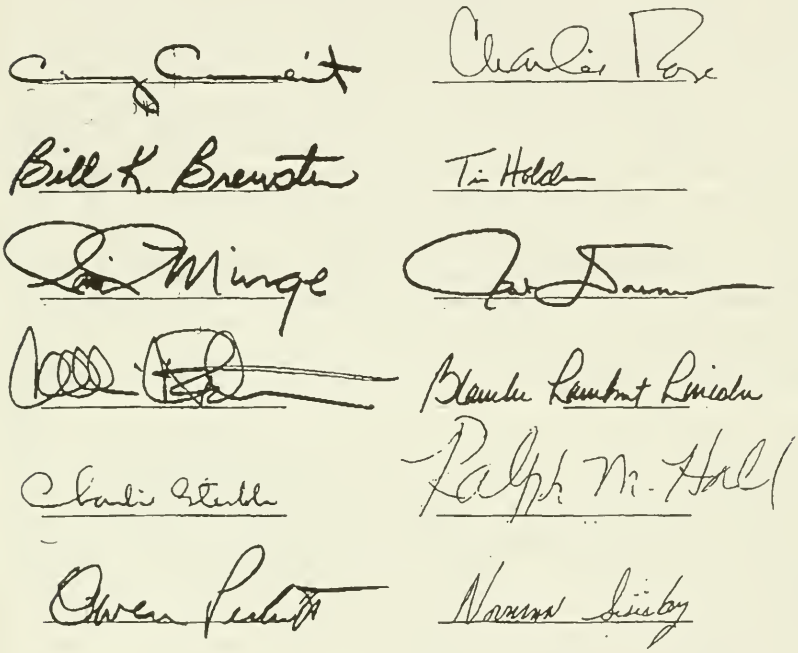
To remove these disincentives to environmental compliance self-evaluation, we urge you to join us in publicly supporting the following principles: (1) grant full immunity from penalties for responsible companies who conduct audits, voluntarily disclose findings of noncompliance and promptly correct violations; (2) provide protection for the internal company audits, which uncovered the violation from use against the company in an enforcement action; and (3) disqualify anyone from any protections if their violations were intentional or willful or if they do not promptly correct the violation. These principles will in no way shield criminal activity, impede reporting of any information which is required by law or protect companies with a pattern of negligence. They will however, encourage full and meaningful self-assessment.

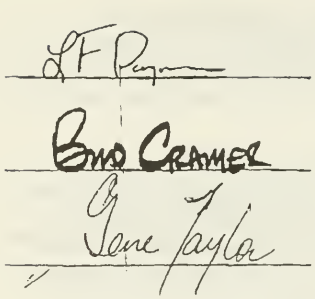
Seventeen states have now passed audit protections into law. These states have determined that auditing is a valuable tool to increase compliance with environmental laws in their states. Twenty-five more states are considering audit protection bills this year for the

same reason. Unfortunately, EPA's ability and intent to "overfile" or take separate enforcement actions is having a chilling effect on the implementation of these state laws. We do not support legislation that hampers strong federal enforcement. However, full and effective implementation of these state's laws will not happen in this adversarial climate and we will have missed an opportunity to encourage this creative and cost effective approach to environmental problems.

We are convinced that this new, non-adversarial approach towards enhancing compliance will increase environmental protection while helping to break down the barriers between government and business. We want you to join us in encouraging this new paradigm by supporting the common sense principles outlined above. Removing disincentives that inhibit auditing so that more companies will make sincere efforts to self-assess, report and correct is a positive step forward to improving environmental protection at less cost. We hope that you agree and will work with us to support state efforts and craft bipartisan legislation to move this issue forward in Congress.

Sincerely,





COORS BREWING CO.,
Golden, CO, June 10, 1996.

Re Comments on S. 582 hearing.

Hon. CHUCK GRASSLEY,
Chairman, Subcommittee on Administrative Oversight and the Courts, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: It is my understanding that some inaccurate statements were made at the hearing on S. 582 before the Committee on the Judiciary, United States Senate, held on May 21, 1996. These comments, made by Mr. Mark Woodall of the Sierra Club, apparently related to an enforcement action taken by the Colorado Department of Public Health and Environment ("CDPHE") against the Coors Brewing Company ("Coors") for emissions of volatile organic compounds ("VOC").

It has been represented to me, since I was not present at the hearing, that Mr. Woodalll stated that "* * * a voluntary audit law such as S. 582" would not have been available to Coors for the VOC situation since the audit performed by Coors was not voluntary but was required to be performed by law. This statement is incorrect in at least two respects: (1) S. 582, if enacted at the time the enforcement action was undertaken, would have protected the voluntary disclosures made by Coors to CDPHE; and (2) the disclosures were indeed voluntary and not required by any law.

First, S. 582 applies to any voluntary and internal assessment initiated by a company and carried out by the employees of the company to determine its compliance with environmental laws. This is precisely what Coors did regarding its VOC emissions. It undertook a voluntary study (the voluntariness of which is discussed below) to determine VOC emissions from its brewing and packaging operations and notified CDPHE of the study. At the conclusion of the study, which determined there were excess VOC emissions, Coors promptly shared its results with CDPHE, agreed to install additional control equipment to address the excess emissions, and cooperated with CDPHE. Clearly, the audit regarding emissions would have been privileged under S. 582 and the Colorado Audit Privilege/Voluntary Disclosure law and the disclosure would have met the rebuttable presumption against imposition of penalties.

As to the voluntary nature of Coors' audit and disclosure, Mr. Woodall is misinformed. The audit conducted by Coors was not required by law or by any authority vested in CDPHE or EPA. All objective reviews of the record have confirmed this. We have documented our position on several occasions and will repeat a portion of it here. Those who have a contrary view have never cited an applicable statute, rule or regulation or produced any order or other official communication from any regulatory agency to support their claims. The reason is simple, no such documentation exists.

There would never have been a VOC issue at Coors had it not been for the company's diligence in understanding and addressing the environmental impacts of its operations. EPA guidance documents and a comprehensive report of brewery VOC emissions conducted by the California Air Resources Board stated conclusively that there were only minor VOC emissions resulting from brewery operations. After applying the EPA guidance documents to calculate emissions from Coors' Golden, Colorado, brewery and related facilities, Coors personnel became suspicious about the accuracy of the results. Ethanol, the alcohol in beer, is a VOC and Coors produces more than 600 million gallons of beer annually in Golden. It did not make intuitive sense that the EPA guidance that indicated only minor VOC emissions was accurate. Coors then launched a voluntary audit of air emissions and notified CDPHE. Coors invited CDPHE to participate in the study, but the Department declined. During the course of the audit, Coors supplied CDPHE with what amounted to a three foot thick stack of documents. The audit found that Coors' suspicions were accurate and that VOC emissions were many times what the government guidance documents had indicated.

Proof of the voluntary nature of Coors' audit and disclosure comes from the official record. On July 21, 1993, CDPHE issued a compliance order related to Coors' VOC emissions. Paragraph 6 in the General Findings of Fact states that in a conference held with representatives of CDPHE's Air Pollution Control Division and Coors, "The Division indicated that the [enforcement action] was based on information voluntarily supplied by Coors based on a review done by Coors of their facility." The Civil Penalty Calculation for Coors Brewing Company attached to the compliance order included a section titled "Circumstances to consider to reduce penalty." Paragraph 1 discusses penalty reductions provided under CDPHE's penalty policy for "Voluntary and Complete Disclosure by Violator of Such Violation in a Timely Fashion After Discovery of the Non-compliance." The policy defines this as "a Company discovers the violation and notifies the Division prior to any Notification of Violation by the Division of the violation." The policy allows for a penalty reduction of up to

15% for fulfilling this requirement. According to the penalty calculation document, "Coors presented the Division with information about violations so a penalty reduction of 15% is given." By providing the maximum reduction, CDPHE must have determined that Coors' disclosure was fully "voluntary and complete." Further evidence comes from a press release issued by CDPHE with the compliance order. The press release states, "Information about Coors' noncompliance was voluntarily offered by the company." Had Coors been required to conduct its audit and had it been required to disclose the results, these facts would have been noted somewhere in the official record. They are not. At the very least, CDPHE would not have made so many references to the voluntary nature of Coors' activities without qualifying them in some way. We have reviewed all correspondence sent to Coors from CDPHE between 1986 and 1991. Nowhere in any of that correspondence is there any mention of any concern about excessive VOC emissions from these facilities.

It should be noted that the whole issue of the voluntariness of Coors' actions is entirely irrelevant to the debate over S. 582. It's a red herring. The opponents are trying to engage the Senate in a debate over something that happened three years ago to divert attention from the fact audit privilege/voluntary disclosure laws now in place in 17 states are working exactly as proponents said they would. In each state where these laws were debated, opponents painted a picture of environmental catastrophe if the laws were enacted. On the other hand, proponents stated that these laws would lead to higher levels of environmental compliance. Look at the record; the laws are not being used fraudulently by wanton corporate polluters attempting to avoid responsibility for intentional violations. The laws are being used by responsible companies that want to improve compliance and work cooperatively with regulators on a level playing field. Certainly, no law is perfect; given enough time some scofflaw will find a loophole. But, some of these state laws have been in place for three years. At this point in the discussion, should we be debating whether Coors' disclosure was voluntary or should we be considering whether S. 582 would be beneficial to the environment based on factual information about how similar laws have worked in one-third of the states in our country?

It's interesting to consider that the opponents' attack on Coors only affirms that S. 582 is a well-balanced piece of legislation. Mr. Woodall, by raising his argument about Coors, has pointed out that there are important limitations and requirements—such as an exception for information that regulated entities are required to gather and report—built into S. 582 so that the law can only be used for its intended purpose. If Mr. Woodall had argued that Coors' disclosure was not voluntary but S. 582, had it been in place, would still have protected the company, I could understand his opposition to the bill. Apparently, Mr. Woodall has acknowledged that S. 582 does not give industry the "license to pollute" that some opponents have claimed. As Mr. Woodall has pointed out, there are important provisions in the bill that effectively narrow its applicability to appropriate uses.

The bottom line is that audit privilege laws have provided exactly the benefits proponents said they would and have created none of the catastrophic impacts opponents predicted. That performance will only improve with the enactment of S. 582.

I respectfully request that this letter be included in the record for the S. 582 hearing held on May 21, 1996. Please contact me at 303–277–2370 (or Richard Crawford in our Washington office at 202–737–4444) with any questions or concerns.

Sincerely,

SCOTT B. SMITH,
Director, Environmental, Health and Safety Policy, Coors Brewing Co.

CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL, INC.,
Washington, DC, January 30, 1996.

Re EPA's final environmental audit and disclosure policy.

STEVEN A. HERMAN, Esq.,
Assistant Administrator, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, Washington, DC.

DEAR MR. HERMAN: During the past two years the Corporate Environmental Enforcement Council (CEEC) has appreciated the opportunity to work closely with you and senior OECA personnel on a number of key enforcement policy issues. We have also appreciated your openness, the dialogue that we have developed on enforcement issues and policies, and your willingness to consider and initiate new and creative approaches to environmental compliance and enforcement.

CEEC believes that our nation's overriding goal should be environmental protection and that enforcement must serve that goal. We also believe that regulators and the regulated community must work cooperatively if we are to meet our nation's en-

vironmental protection goals. But, the reality is that with expanded and more sophisticated auditing and compliance management systems on the one hand, and more aggressive enforcement and third party suits on the other, an additional and significant tension between regulators and the regulated community has arisen and opportunities have been lost that would have benefited the environment. We want to work with you and the Agency to reduce enforcement tensions and compliance obstacles as well as identify opportunities that will enhance environmental protection.

CEEC believes the Federal audit protection and voluntary disclosure legislation is necessary because an Agency's policy cannot, by definition and by limitations imposed on the Agency's authority, eliminate this additional tension or all of the obstacles to self-policing. If the Final Policy had recognized the need to provide qualified protections to audit reports and for disclosures and provided the regulated community with needed certainty in that regard, the Policy would have been a step in the right direction, but it was not and therefore an opportunity for the environment has, in the context of the Policy, been lost. The Agency, by not addressing these issues constructively, and in fact attacking them, makes the need for federal legislation even more imperative if protections for the environment are to be maximized.

During the dialogue on the policy in which our organization was pleased to participate, CEEC—relying on the expertise and experience of its members—discussed with EPA why the failure to have in place adequate and certain protections for audit reports created obstacles to environmental auditing and had a strong chilling effect which severely reduced the utility of audits that are undertaken. As CEEC explained, a responsible regulated entity that audits should not be in a position of greater potential liability than an entity that does not audit. For that matter, neither should its management or environmental personnel be put at greater risk.

In issuing the Final Policy, EPA emphasized that voluntary auditing and disclosure (i.e., self-policing) by the regulated community were—especially with EPA's limited resources—critical to achieving the environmental protection goals. Unfortunately, in the Final Policy (60 F.Reg. 66706, December 22, 1995) EPA chose to continue the limited penalty mitigation approach to these issues that it had adopted in the Interim Policy. While CEEC commends EPA for significantly improving its penalty mitigation criteria, this approach—which in terms of penalty mitigation is in need of further revision—falls far short of the environmental protections EPA could have achieved through the adoption of a broader policy.

Included within the areas where refinements to the Final Policy should be considered are the criteria for penalty reduction, the manner in which repeat violations are determined (particularly for larger companies) and the lack of protection for individual employees. We look forward to discussing these and other possible areas of refinement with you and your staff as the Policy evolves or is included in a rulemaking.

We also want to share with you that CEEC remains concerned about the Agency's continuing critical and threatening position with respect to federal enforcement in those states whose legislatures have made the decision to foster environmental protection and improve compliance by enacting legislation which provides qualified protections for audits and/or voluntary disclosures. We do not believe the EPA should put itself in the position of overriding state law which will be the practical effect of the Agency's threat of overfiling. The statements directed at states who have addressed or who are considering qualified audit protection and voluntary disclosure legislation assumes that those states are incapable of enforcing environmental laws and that they have not or will not apply legal accountability and compliance assurance in their policies and actions. To the contrary, we believe that these states are committed to environmental compliance and enforcement. We will look forward to discussing this issue with you as part of our continuing dialogue.

In addition, we would appreciate a clearer understanding of why the Agency has used the Final Policy as a forum to attack federal audit protection and voluntary disclosure legislation? We would respectfully suggest that the Final Policy is not a proper vehicle nor the proper venue for attacking legislation that is pending in Congress. These attacks are disappointing and in our view, inappropriate. They do not accurately portray either the terms or impacts of the balanced legislation that CEEC and many other groups of regulated entities—including universities, municipalities and others—are supporting. In addition, the arguments EPA offers in opposition to the legislation do not withstand scrutiny. We would hope that EPA—with a clearly developed recognition of the many obstacles to auditing and self-disclosure and of the significant environmental protections that flow from its encouragement—will become an active and positive participant in a dialogue as Congress exercises it's policy setting role. We remain hopeful that upon further analysis the Agency will not feel compelled to reject a balanced legislative approach that will maximize

the very environmental objectives it most recently emphasized in issuing the Final Policy.

On behalf of CEEC, I would again like to personally thank and your staff for all of the effort that went into the development of the Final Policy. Clearly there are a number of other important enforcement issues, such as developing new measurements of the success of EPA's enforcement program, the proper level of criminalization of environmental laws, the integration of ISO 14000 and others on which we will look forward to continuing a constructive dialogue. As always, you should know that you have a standing invitation to meet with our CEEC members on either general environmental enforcement policies or specific issues such as the final policy.

Sincerely,

CARL A. MATTIA,
CEEC, Chairman of the Board,
Vice President, Environment, Health and Safety Management Systems,
The BF Goodrich Co.

STATEMENT OF CORPORATE ENVIRONMENTAL ENFORCEMENT COUNCIL FOR THE JULY 27 AND JULY 28, 1994 PUBLIC MEETING OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY ON ENVIRONMENTAL AUDITING POLICY AND RELATED ISSUES

Corporate Environmental Enforcement Council:

AT&T
BF Goodrich Company
Coors Brewing Company
Eli Lilly and Company
Kaiser Aluminum & Chemical Corporation
Hoechst Celanese Corporation
Kohler Company
Polaroid Corporation
Textron, Inc.

Steven B. Hellem
Executive Director
601 King Street
Suite 301
Alexandria, VA 22314
(703) 739-1365

Submitted by:

Paul G. Wallach
Sloane E. Anders
Counsel for
Corporate Environmental Enforcement Council

Hale and Dorr
1455 Pennsylvania Ave., N.W.
Suite 1000
Washington, D.C. 20004
(202) 942-8400

Preliminary Statement

A group of diverse companies with strong environmental commitments and programs came together in mid-1993 to form the Corporate Environmental Enforcement Council ("CEEC")[1]. Combining the expertise and experience of these companies, CEEC focuses exclusively on civil and criminal environmental enforcement policy issues.[2]

CEEC supports vigorous enforcement of the environmental laws which consistently punish deliberate and willful misconduct. CEEC is concerned, however, that enforcement is often arbitrary, inconsistent and overly punitive, and that those who make every effort to comply and work cooperatively with the government are often treated unfairly. CEEC's members believe that if we are to be internationally competitive and achieve our national environmental goals, environmental enforcement must be structured to promote voluntary compliance which prevents, detects and corrects violations.

As CEEC has for quite some time been analyzing and discussing issues that will be covered at the public meeting, the comments that follow will be relatively lengthy and detailed. However, our conclusions and recommendations are straightforward.

CEEC believes that the failure to offer adequate protections for audit reports creates a strong disincentive to environmental auditing and has a chilling effect which severely reduces the utility of the audits that are undertaken. CEEC feels strongly that an overriding goal of EPA enforcement policy should be to

---

1 At present CEEC's members include AT&T, BF Goodrich Company, Coors Brewing Company, Eli Lilly and Company, Kaiser Aluminum & Chemical Corporation, Hoechst Celanese Corporation, Kohler Corporation, Polaroid Corporation, and Textron, Inc. As these comments reflect the consensus view of CEEC, they do not necessarily represent the position of each individual member. Also, some of CEEC's members, including Coors Brewing Co., will be submitting individual written statements.

2 During the past eleven months, CEEC's members have met informally with senior civil and criminal enforcement officials from the United States Environmental Protection Agency ("EPA") and the United States Department of Justice ("DOJ"). CEEC has also met informally with Commissioners of the U.S. Sentencing Commission, as well as with others who are seeking to impact national environmental enforcement policy.

ensure that responsible members of the regulated community who undertake self-evaluation programs (such as audits) are not placed in a position where they actually have created or expanded their liability under the environmental laws.

Thus, CEEC recommends that the EPA build upon its 1986 Audit Policy by adopting a qualified self-evaluative privilege for audit reports and related communications. To ensure full and appropriate protections, CEEC also recommends that the EPA work with the regulated community to develop model state and federal legislation,[3] much like the provisions in the statutes recently enacted in Oregon, Colorado, Indiana and Kentucky.[4]

At the public meeting EPA is also reassessing its policy with respect to the critical issue of voluntary disclosure. CEEC believes that the agency's recognition of the importance of this issue is itself quite a positive step, especially as voluntary disclosure was not even mentioned in the 1986 Audit Policy. The absence of a formal program has been a significant obstacle to voluntary disclosure and to the development of monitoring programs, especially in the small business community.

Thus, CEEC recommends that the EPA develop a voluntary disclosure program that provides protections for those who voluntarily disclose violations of an environmental law. CEEC believes that, in the limited situations where such protections are not appropriate, the agency should establish predictable criteria that reflect the importance of voluntary disclosure as a substantial mitigating factor with respect to any agency enforcement response.[5] CEEC's recommendations as to the specific elements of a voluntary disclosure program are set forth in the latter sections of these comments.

---

3 CEEC believes that legislation is necessary for a number of reasons, not the least is that it can offer full protection in the citizen suit context.

4 CEEC is disappointed by EPA's criticism of these states and the agency's repeated threats to withdraw their delegated program authority. Noting that the EPA in its 1986 Policy Statement invited additional state review and action with respect to environmental audits CEEC hopes that the agency will recognize the inappropriateness of its criticism and move forward in tandem with the states.

5 In that regard CEEC expresses its willingness to work with the agency to develop data that we believe will show the significant inconsistencies and unfairness in EPA enforcement actions to date.

In summary, CEEC looks forward to joining with the EPA and others in the dialogue, and believes that it will be an extremely constructive participant. We are also pleased that senior EPA officials have recognized that the agency is at a critical enforcement policy juncture. Recognizing that its enforcement program could be improved, last Fall EPA announced the reorganization of the agency's "enforcement arm," newly renamed the Office of Enforcement and Compliance Assurance ("OECA"). Administrator Browner emphasized that OECA "will help companies obey environmental laws -- and will take strong action against those who do not."[6]

More recently, at a breakfast meeting on July 13 sponsored by the National Association of Manufacturers, the EPA Administrator discussed the agency's "Common Sense" Initiative. Ms. Browner emphasized that the "EPA was going to move beyond environmental regulation to environmental protection." Ms. Browner also stated

> The government cannot protect environmental health and safety alone, but must have every opportunity to work with industry in a non-adversarial fashion.

Thus, to paraphrase the words of one commentator, the Administrator has decided to influence behavior of the regulated community by creating a compliance structure where self-policing is the norm, and improved compliance can be achieved without massive use of government proceedings[7]. CEEC completely agrees, and believes that the environmental requirements are too complex, and that environmental protection is too important to allow the current "enforcement first" policy to continue. In fact, we assume that the Administrator's directive to reassess the agency's audit policy was intended as an important step toward the abandonment of that policy.

Structuring The Dialogue

As stated in the EPA's Notice of Public Meeting on Auditing (the "Notice")[8], pursuant to instructions from Administrator Browner, Assistant Administrator Herman announced that OECA had a

---

6 EPA Administrator Details Design of Reorganized Enforcement Office, EPA Envtl. News, Oct. 13, 1993.

7 See, Michael H. Levin, Allan D. Hymes and Sean Mullaney, Discovery and Disclosure: How to Protect Your Environmental Audit Report, Env't Rep. (BNA), Jan. 7, 1994.

8 59 Fed. Reg. 31914 (June 20, 1994).

plan to reassess current policy regarding environmental auditing and self-evaluation. EPA noted the confusion that currently exists in this area. As the first planned step in this process, the OECA has scheduled this "public meeting on environmental audits and related issues." EPA stated its expectation that this session and the ensuing dialogue would allow EPA to obtain a wide range of views and "sharpen its focus." EPA also noted that following the public meeting, EPA will "work with the private sector to conduct surveys and collect data on current auditing practices and the effect of EPA's enforcement policies."

To assist in "sharpening the focus" of the meeting and of the ensuing dialogue, CEEC believes that the key points listed below should be kept in mind throughout the reassessment process:

- The encouragement of environmental auditing, and of the environmental compliance and management systems of which it is a part, is closely related to the question of voluntary disclosure. Protection of audits must be provided and a voluntary disclosure program established if the problems with the current environmental enforcement program are to be fixed.

- Environmental auditing has grown dramatically and become more sophisticated in recent years. EPA'S policy should reflect that audits are undertaken for many different purposes and that there are different types of audits (e.g., management, compliance, and transactional). EPA should also recognize that with industry's expertise and established lines of communication, industry audits are much more effective then government inspections as vehicles for identifying and rectifying compliance shortcomings.

- In the last decade the number and complexity of environmental laws, regulations, policies and procedures have grown dramatically. Regulated entities -- ranging from large manufacturers, to small printing firms, to hospitals, to government installations-- no matter how well-intentioned, have often been overwhelmed by this expanding mass of requirements. Also, environmental requirements are administered by a mix of various federal, state and local agencies, each of which may adopt interpretations of regulations inconsistent with the other. Thus, it should not be a surprise that regulated entities cannot ensure that their facilities are always operating in full "compliance" with every environmental requirement.[9]

---

[9] See, James W. Moorman and Laurence S. Kirsch, Environmental Compliance Assessments, 26 Wake Forest L. Rev. 97 (1991).

- The failure to adequately protect audit reports and related communications creates a strong disincentive to environmental auditing. CEEC believes that the ultimate goal of EPA policy should be to ensure that companies that perform audits are not exposed to any increased risk of liability.

- There is much more than anecdotal evidence with respect to the use of environmental audit reports by enforcement officials, citizen groups, toxic tort plaintiffs and others. However, as that data does not appear to exist in one place and will for a number of reasons be difficult to collect, it should be gathered jointly by the government, the regulated community and other interested parties.

- International developments, such as the ISO 14000, will, if implemented, under current U.S. law create a negative incentive for companies to be certified in this country and thus present a competitive disadvantage for U.S. companies. The unfairness and anti-competitive consequences of the EPA's 1986 Audit Policy thus needs to be addressed.

- Rather than simply request that the regulated community provide data relating to the effects of its enforcement policies on auditing, EPA should first compile and disclose the data available to it, and then work cooperatively with the regulated community to effectively compile any additional data.

- EPA must recognize and give appropriate credit in any enforcement response to the tremendous and unprecedented advances of many in industry in the field of environmental compliance and management.

- The increase in environmental enforcement, the escalating fines in civil cases, the increase in citizen suits, the focus on criminal prosecutions, and the focus on individuals as targets of criminal prosecutions have all combined to grab the attention of the regulated community, corporate management and responsible environmental personnel. Regardless of what the analytical data may show, there is a genuine concern regarding potential liability and the belief that self-evaluative programs (such as audits) will create or expand liability for even the most responsible companies.

- Although enforcement and punishment serve to educate the regulated community on what not to do, they do not successfully promote voluntary compliance. Stated another way, the ultimate goal of enforcement is compliance, not the assessment of civil and criminal penalties.

- In addition to federal enforcement, state and local enforcement, as well as citizen suits, are a major concern with respect to the use of environmental audits. As the agency recognizes, in recent years hundreds of citizen suits have been based exclusively on the self-monitoring data the regulated community provides to the government. The number of such suits will likely increase if more industry data is made available through disclosed environmental audits.

- In its 1986 Auditing Policy Statement, EPA encouraged states to create their own policies to encourage self-auditing. CEEC believes that the states should be commended, not criticized, for enacting legislation that adds to the incentives for voluntary self-evaluation, while at the same time ensuring that audits are not immune from disclosure where absolutely necessary for enforcement purposes.

- CEEC believes that the EPA should explain and document its stated concerns with respect to the qualified privilege legislation that has been enacted by the four states.

In the pages that follow, through the collective comments of its members, it is CEEC's intention to provide useful information to the EPA as it reassesses its audit policy and the issue of voluntary disclosure.

DISCUSSION

In these comments CEEC discusses the 1986 Auditing Policy Statement, the DOJ 1991 Criminal Enforcement Policy Statement and Mr. Devaney's January 12, 1994 memorandum on the Exercise of EPA's Criminal Investigative Authority. While these documents represent positive steps in the right direction as they recognize the value of environmental auditing, they do not sufficiently protect the confidentiality of the audit documents which remain subject to disclosure at the government's discretion.

CEEC believes that the qualified audit privilege statutes recently passed by the four states strike the proper balance between the limited circumstances where there is a justifiable need for disclosure and the protection of audit reports. Consistent with the Administrator's recent statements, this balance needs to be reflected in EPA's enforcement program.

Similarly, CEEC believes that the EPA -- as part of the dialogue that is being launched by the public meeting -- needs to develop a clear and consistent voluntary disclosure program as part of its enforcement program, and that adequate incentives must be included if this program is to be successful. Other federal agencies and departments, ranging from the Federal Aviation

Administration ("FAA"), to the Nuclear Regulatory Commission, to the DOJ's Antitrust Division have existing voluntary disclosure programs that should be closely examined as the reassessment moves forward.

I. EPA's 1986 Auditing Policy Statement

In 1986 EPA issued its Final Policy Statement On Environmental Auditing (the "Auditing Policy Statement").[10] In the Auditing Policy Statement, the agency recognized the importance of sound environmental management practices, and of environmental auditing in particular. EPA emphasized its desire to encourage the use of environmental auditing.[11]

Notwithstanding the agency's recognition that government requests for audit reports could inhibit auditing,[12] EPA would not disavow requesting audit reports in the future, stating only that as a policy matter it would not "routinely request" audit reports. The Auditing Policy Statement underscores that the decision to request all or a portion of an audit report would be made on a "case-by-case basis." The agency identified areas where requests would likely be made, including when it determined that the audit report was needed to "accomplish a statutory mission" or "the government deems it material to a criminal investigation."[13]

Given the lack of assured protection for audit reports, the regulated community has taken little comfort in the Auditing Policy Statement.[14] Indeed, the exceptions identified by EPA seem

---

10 51 Fed. Reg. 25004 (July 9, 1986).

11 The EPA also encouraged environmental auditing when it issued its memorandum, EPA Policies Regarding The Role Of Corporate Attitude, Policies, Practices and Procedures, In Determining Whether To Remove A Facility From The EPA List Violating Facilities Following A Criminal Conviction. 56 Fed. Reg. 64785, (Dec. 12, 1991). See also, Policy on the Inclusion of Environmental Auditing Provisions in Enforcement Settlements, OSWER Dir. No. 9891.3 (Nov. 14, 1986).

12 Auditing Policy Statement, 51 Reg. at 25,007.

13 EPA also specifically reserved the right to obtain audit reports when "state of mind or intent" are a relevant area of inquiry. Id.

14 EPA would not commit to forego inspections, enforcement responses, or offer other such incentives "in exchange for" environmental auditing. Id.

to swallow the rule. Especially as various of CEEC's members have been told that EPA now screens every violation as a potential criminal case, the exception for criminal investigations itself undermines EPA's stated attempt to encourage environmental audits.

It is also important that to our knowledge the agency has not taken all of the steps necessary to implement its Auditing Policy Statement. Experience has shown that EPA Regional Offices and even EPA Special Agents are often not well informed with respect to the Auditing Policy Statement. Indeed, EPA enforcement personnel have frequently acknowledged their unfamiliarity with the Auditing Policy Statement in presentations at various conferences. Thus, EPA should not be surprised that the Auditing Policy Statement has spawned confusion in the regulated community. Nor is it surprising that companies conduct audits assuming that they will be required to disclose both the report and the underlying data.

Although the agency recognized in the Auditing Policy Statement that the ability to routinely request audit reports will inhibit the development of audit programs, we do not understand why a policy which allows requests solely as a matter of EPA's discretion would not bring about the same result. Perhaps with a recognition that the Auditing Policy Statement did not resolve the dilemma, the EPA stated:

> State and local regulatory agencies have independent jurisdiction over regulated entities ... EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate these particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing.[15]

II. DOJ Policy Statement

The DOJ Criminal Enforcement Policy Statement[16] ("DOJ Policy Statement") was issued on July 1, 1991, in response to the

---

15 Id. at 25006.

16 Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator, July 1, 1991. To a large extent, the DOJ Policy Statement incorporates the principles set forth in the Organizational Sentencing Guidelines.

confusion and concern in the regulated community that a voluntary self-auditing program and/or cooperation with regulators could result in criminal prosecution of a company, its management and its employees.

According to then senior DOJ officials, the DOJ Policy Statement was designed to calm fears in the regulated community and to assist prosecutors in deciding whether to institute prosecutions for environmental non-compliance. The DOJ Policy Statement describes various factors to be considered in the prosecutor's exercise of enforcement discretion.[17]

The DOJ Policy Statement represents a significant first step as it recognizes the importance of DOJ prosecutors avoiding disincentives for voluntary self-auditing and disclosure and identifies various factors in that regard. However, being only a first step, it unfortunately enhances the dilemma by encouraging comprehensive environmental auditing and self-disclosure, without providing a formal program defining a consistent enforcement response. Experience with the DOJ Policy Statement suggests that it has had a chilling impact for a number of reasons:

- It is only an internal guideline that neither binds DOJ nor creates any enforceable rights.
- There is no assurance that comprehensive environmental programs will be given appropriate credit.
- It creates an ideal company with an idealized compliance program that most businesses, especially small businesses, and non-profit institutions will not be able to achieve. Moreover, even for the ideal company, there is no guarantee against prosecution.
- Even companies with superior environmental programs can be prosecuted based on unspecified "other factors."
- By creating an ideal program, the DOJ Policy Statement suggests that DOJ will prosecute if a company has anything less.

---

17 These factors are voluntary disclosure, cooperation, preventive measures and (regularized, intensive and comprehensive) compliance programs (including environmental compliance or management audits), pervasiveness of non-compliance, internal disciplinary action, and subsequent compliance efforts. The policy "applies" these factors to a continuum of eight hypothetical examples.

- The DOJ Policy Statement requires that companies identify all individuals involved in any detected violation (even if there was no deliberate act and the violation was technical with no harm resulting).

- The DOJ Policy Statement does not discuss whether the specified factors are also relevant for civil enforcement (which is especially important given escalating fines and penalties).

- By requiring full disclosure the DOJ Policy Statement makes clear that the DOJ does not recognize any protection for audit reports or the underlying data. This is especially important as the DOJ Policy Statement does not discuss government civil actions, or actions by third-parties (such as citizen suits), or even requests for information by competitors or environmental groups or the media.

- The DOJ Policy Statement has no legal impact on state or local prosecutors.

III. EPA's Memorandum Regarding Investigative Discretion in Criminal Enforcement

As referenced in the Notice, on January 12, 1994 the Director of EPA's Office of Criminal Enforcement, Earl Devaney, issued a memorandum entitled "The Exercise of Investigative Discretion". Mr. Devaney noted that

> As EPA's criminal enforcement program enters its second decade and embarks on a period of unprecedented growth, this guidance establishes the principles that will guide the exercise of investigative discretion by EPA Special Agents.[18]

The guidance sets forth the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities. The memorandum indicates that EPA's criminal case

---

18 This guidance does not apply to the FBI or other federal agencies or to state and local authorities. Also, as is the case with the DOJ Policy Statement, the Devaney memorandum is intended only as internal agency guidance and does not create any enforceable rights.

selection process will be guided by two general measures --- significant environmental harm and culpable conduct, and cites various factors as "indicators" that a case meets these investigative standards.

CEEC believes that Mr. Devaney has correctly identified the key investigative criteria, and CEEC applauds EPA for going beyond the DOJ Policy Statement in noting that:

> ... a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.

However, by its own terms, the memorandum is extremely narrow and limited in scope, and suffers from many of the same deficiencies we have previously discussed with respect to the DOJ Policy Statement, including the lack of certainty, the fact that it does not bind the agency, and the failure to describe the impact of these criteria on civil enforcement investigations.

IV. The Audit Dilemma

Over the past fifteen years environmental audits have grown tremendously in use, in comprehensiveness and in sophistication.[19] Although there are many different types of "environmental audits" EPA has defined "environmental auditing" as the "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements."[20]

For many companies, environmental audits are now routine. As one commentator has noted:

---

19 International standards for auditing are now being developed. For example, if ISO 14000 is adopted, environmental audits will be required as part of overall quality standards. Continuing to allow for their disclosure and punishment for self-policing would place our industry at a competitive disadvantage, as audits are protected elsewhere and companies not punished for voluntarily disclosed violations.

20 Auditing Policy Statement, 51 Fed. Reg. at 25,006. To our knowledge, EPA has not considered whether different types of environmental audits-- such as auditing business functions, product lines, and organizational systems-- should be subject to varying degrees of protection.

> In the early years, environmental assessment promised to be an important means for responsible corporations to approach the difficulties of complying with complicated regulatory programs. EPA encouraged voluntary assessments and suggested that their confidentiality would be respected. Just the same, much of the willingness of corporations to create and use candid written self-evaluation documents depended upon their anticipated ability to keep such documents confidential.[21]

Currently, no environmental law requires entities to institute formal auditing programs, although the Clean Air Act Amendments of 1990 require that an owner or operator of a permitted major source certifies the compliance status. 42 U.S.C. § 7414(a)(3)(1991). Nevertheless, extensive self-monitoring and reporting of certain emissions, discharges and hazardous waste practices, among other things, are required under federal statutes such as the Clean Air Act, the Clean Water Act, the Emergency Planning and Community Right-to-Know Act of 1986, and the Resource Conservation and Recovery Act.[22] Self-monitoring and reporting

---

21 Edmund B. Frost, Voluntary Environmental Compliance Audits: A DOJ Policy Failure, Toxics L. Rep. (BNA) 499, Sept. 18, 1991. Mr. Frost is now the Vice President and General Counsel of Clean Sites, Inc.

22 Although Congress has not yet included a self-evaluative privilege in legislation, it considered such a privilege in the context of the Clean Air Act Amendments of 1990. The Statement of Managers contained the following language

> Voluntarily initiated environmental audits should be encouraged and, in the course of exercising prosecutorial discretion under the criminal provisions of subsection 113(c), the Administrator and the Attorney General of the United States should, as a general matter, refrain from using information obtained by a person in the course of a voluntarily initiated environmental audit against such person to prove the knowledge element of a violation of this Act if -- (1) such person immediately transmitted or caused the transmission of such information to the Administrator or the State air pollution control authorities, as appropriate; (2) such person corrected or caused to be corrected of such violation as quickly as possible; and (3) in the case of a violation that presented

are often required at the state and local levels as well.

Both EPA and industry recognize that environmental auditing can lead to significantly higher levels of overall compliance, improved environmental performance and reduced risk to human health and the environment. They can also be used to review a company's environmental management structure and resources. By way of example, audits often are used to:

- Assess and reduce environmental health and safety risks beyond those required by regulation.
- Anticipate upcoming regulatory requirements (which enables facilities to manage pollution control in a proactive manner).
- Prioritize pollution prevention activities.
- Help management to understand new regulatory requirements and corporate policies.
- Assess internal management and control systems.
- Measure progress toward compliance and elimination of risk goals.
- Improve expeditious communication regarding environmental developments to facility personnel and, where appropriate, ensure effective communication with government agencies and the public.
- Assure capable personnel are available at all times to perform emergency and other environmental functions.
- Evaluate causes for environmental incidents and determine procedures to avoid recurrence.
- Assure sufficient budgeting for environmental concerns.

---

an imminent and substantial endangerment to public health or welfare or the environment, such person immediately eliminated or caused the elimination of such endangerment to assure prompt protection of public health or welfare or the environment. 136 Cong. Rec. S16951 (Oct. 27, 1990).

- Provide a means for employee training and performance evaluation.

- Maximize resources through recycling, waste minimization, and other pollution prevention measures.

- Fulfill various other obligations, such as providing appropriate disclosure to other agencies (e.g., SEC), and evaluating the environmental aspects of corporate or real property transactions.

Although critical, audits are only one piece of an environmental compliance program. Other environmental management features often include:

- Employee reporting systems, such as a "hotline" to facilitate employee reporting of environmental problems.

- Employee training programs.

- Performance incentives. By incorporating bonuses and promotions based on a manager's history of environmental compliance, a company both provides an essential incentive for compliance and demonstrates a commitment to compliance efforts.

- Voluntary disclosure of environmental violations where disclosure is not otherwise required by statute or regulation.[23]

Industry has been quite progressive with respect to auditing and the establishment of environmental compliance programs.

---

23 The organizational Sentencing Guidelines allow a significant sentence reduction for an "effective program to prevent and detect violations of law." Sentencing Guidelines §8C2.5(f). The Sentencing Guidelines provide that an organization that commits a violation despite "an effective program to prevent and detect violations of law" will have three "points" subtracted from its "culpability score." The culpability score is a component of the company's overall fine calculation. While credit for an environmental compliance system is commendable, it needs to be emphasized that the Sentencing Guidelines only apply following a criminal conviction. Also, they do not presently apply to environmental offenses.

Industry representatives have predicted that the "next generation of environmental compliance" will rely on "regulatory self-evaluation systems" -- day-to-day management systems that include audits which "lead to compliance and maintenance of pollution controls."[24] Many industries have already begun to implement these programs.[25]

Environmental audits themselves are becoming increasingly sophisticated and more widely used. New areas are continually being included, such as industrial hygiene and process hazard issues. In addition, audits are increasingly being used to target health and safety issues, which are sometimes integrated into comprehensive environmental, health and safety audit programs.[26] Audits have also been increasingly affected by the needs of multi-national corporations and the desire for consistency among the environmental standards of different countries. Auditing techniques are constantly improving as well and are increasingly being included as part of "total quality management initiatives."[27] Finally, companies are using "environmental life-cycle audits" to determine the totality of impact that consumer products or processes may have on the environment.[28]

In recent years we have witnessed tremendous public pressure on the government to increase enforcement of the environmental

---

24 Daily Envtl. News (BNA) at A-7, June 21, 1994.

25 See, e.g., Mark A. Bindbeutel, Achieving Environmental Excellence: The Transforming of Regulatory Futility into Environmental Agility at Chrysler, Envtl. Mgmt. Rev. 88, Second Quarter, 1994; Barbara J. McGuinness, DuPont's Environmental Audit Program, Envtl. Mgmt. Rev. 71, Second Quarter 1993.

26 See, Brian A. Martinson, The Proactive Advantages of Environmental Audits, Waste Dynamics of the Northeast at 3, 38, June 1994.

27 Id.

28 Id. Given the complexity of the regulatory requirements, audits often utilize automated information systems as a means of achieving enhanced productivity and quality control for the company. Also, audit findings can be integrated with other corporate databases. See, Frank J. Priznar, Trends In Environmental Auditing, 20 Envtl. L. Rep. (Envtl. L. Inst.) 10179, May 1990.

laws.[29] As more and more companies are now managing themselves in an environmentally responsible manner, with only a handful operating "outside the system" by deliberately ignoring and/or violating environmental requirements, the vastly enhanced enforcement resources of the government are now focusing on responsible corporate citizens. Given the complexity of the environmental regulatory scheme and the myriad regulations applicable to various sectors of the regulated community, 100% compliance is extremely difficult, if not impossible. Indeed, while compliance is difficult for even the most sophisticated companies, smaller companies and non-profit institutions -- with minimal technical and financial resources -- often lag behind.[30]

While there are other considerations that often militate against conducting an audit, or at least specific components of an audit,[31] the primary concern is still the liability threat.[32]

---

29 Also, within the past year we have seen unprecedented criticism and oversight by at least one Congressional Committee regarding specific declinations to prosecute by line-prosecutors in the DOJ's Environmental Crimes Section.

30 The difficulties of managing for compliance are eloquently described by Frank Friedman, as the then Vice President for Health and Environmental Safety for Occidental Petroleum in an article, Is This Job Really Worth It? The Envtl. Forum, at 20, May/June 1991. Also, then EPA Assistant Administrator for Solid Waste and Emergency Response, Don Clay, often is quoted as having stated, "RCRA is a Regulatory cuckoo land of definition . . . I believe we have five people in EPA who understand what hazardous waste is."

31 Terrell E. Hunt and Timothy A. Wilkens, Environmental Audits and Enforcement Policy. 16 Harv. Env. L. Rev. 365 (1992), note that the costs of auditing are significant and diverse. They include direct expenditures of financial resources, as well as indirect costs such as interruptions of facility operations, disruption of interpersonal relations, and the use of the company's human resources.

32 Messrs. Hunt and Wilkens note: "In order to be useful to a company and to indicate appropriate corrective action, audit reports must include comprehensive information concerning the company's existing or potential environmental liabilities. Such a report, however, becomes a tremendous resource for prosecutors, regulators and toxic tort plaintiffs" (as well as citizen groups and competitors). Id. at 373. This concern was clearly reflected in a national survey of corporate general counsel conducted by the National Law Journal and

This has led to a reluctance to conduct audits and too much caution in the scope of audits that are undertaken.

Audits today are often designed to maximize the attempt to protect the contents of the audit report.[33] Although at present the most protection is offered by the attorney-client privilege, its successful assertion requires the involvement of an attorney at every step of the process.[34] This necessarily increases the duration and cost of audits, making them less attractive, and even more distant and difficult for most small businesses.

Moreover, attempts to preserve the confidentiality of the audit report through the assertion of the attorney-client privilege have met with only mixed success.[35] Similarly, attempts

---

Arthur Andersen. See Natl. L.J. Supp. at 2, March 16, 1992.

33 For example, the distribution of audit reports within a company can be tightly controlled; audit reports are often written in vague and neutral language and technical information is often purposefully separated from legal conclusions and advice.

34 For the attorney-client privilege to apply, the audit must consist of communications within the attorney-client relationship, the audit must be under the direction of an attorney, the attorney must be acting as a lawyer (*i.e.*, providing legal advice), the communication is for the purpose of obtaining such advice, and finally there must be no waiver of the confidential nature of the communication.

35 There are several major impediments to the application of the attorney-client privilege. First, the privilege only applies if the attorney directs and controls the audit process. Second, because the communications must be made when the attorney is acting as a lawyer, any information collected for non-legal purposes (e.g. financial, management, etc.) are not protected. Also, the facts underlying the communication are not protected. Third, the communication must occur primarily to obtain legal services or advice. Not all communications conducted during an audit process will fall squarely within the scope of legal advice. Finally, if communications are disclosed to third parties, such as employees who otherwise do not need to know the information, the privilege may be destroyed. Notwithstanding all of these obstacles, however, the attorney-client privilege was recently successfully invoked to shield the disclosure of an environmental audit report to another company. Olen Properties v. Sheldahl, Inc., No. Civ. 91-6446 (C.D. Cal. 1994).

to utilize the attorney work-product doctrine are often not likely to be successful.[36]

Unfortunately, the privilege that "best fits" environmental audits, the so-called "self-evaluative" or "critical self-analysis" privilege, is not sufficiently developed under existing case law. In concept this privilege is applicable in situations where it is in the public interest to encourage entities to evaluate a specific incident or ongoing operations and policies, and it protects related confidential communications. It originated in the medical malpractice context, where a hospital successfully protected internal meeting notes regarding its care of a patient because of the "overwhelming public interest" in promoting internal self-criticism.[37] The privilege has since been asserted in a variety of contexts.

Although the policies supporting the self-evaluative privilege are applicable in the environmental audit context, it has to date not been accepted by the courts. For example, in United States v. Dexter Corp.[38] the privilege was asserted with respect to certain self-evaluative documents in a government action alleging violations of the Clean Water Act. The court rejected the defendant's claim that protection of these documents was in the public interest, instead stating that the fact that the government was a party made this argument irrelevant.[39] The court found that, since Congress had established an overriding policy of

---

36 The attorney work product doctrine applies to materials prepared in anticipation of litigation -- meaning that it is only applicable if some sort of litigation is imminent and the audit "reflects the attorneys' concern for litigation." In addition, the materials cannot be prepared in the ordinary course of business. As with the attorney-client privilege, disclosure to a third party destroys the privilege's applicability. Also, even if applicable, it is a qualified protection that can be overcome.

37 Bredice v. Doctor's Hospital, 50 F.R.D. 249, 250 (D.D.C. 1970). The self-evaluative privilege has also been successfully invoked in certain Civil Rights Act cases. See, Thomas L. Weisenback and Ritaelena M. Casavechia, Guidelines for Prosecution of Environmental Violations: The Tension Between Self-Reporting and Self-Auditing, Envtl. Developments (BNA), at 2484, Mar. 6, 1992.

38 132 F.R.D. 8 (D. Conn. 1990).

39 Id. at 9-10.

enforcement of the Clean Water Act, the defendant's assertion of privilege was outweighed by this "public policy."[40]

Thus, although companies can and will take a variety of steps to protect audit reports, there is still no reliable means of protecting them from disclosure. CEEC believes that except in very narrow circumstances such protection is critical to encourage companies to discover and correct potential problems and to maximize environmental protection. Thus, CEEC believes that it is essential that a qualified audit privilege be implemented through other means, such as legislation.

V. State Environmental Audit Privilege Legislation

As the EPA notice indicates, four states (Oregon, Kentucky, Indiana and Colorado) have enacted qualified environmental audit privilege legislation.[41] Many other states have introduced or are considering such legislation. Contrary to EPA's suggestion in the Notice, the enacted legislation does not create a blanket privilege that prevents the government from obtaining the information that is included in an audit report. Nor is there any ability to protect information that is otherwise required to be disclosed.

In October, 1993, Oregon became the first state to enact environmental audit privilege legislation. Senate Bill 912 provides:

> In order to encourage owners and operators of facilities and persons conducting other activities regulated under [this chapter] or its federal, regional, or local counterpart or extension, both to conduct voluntary internal environmental audits of their compliance programs and management systems and to assess and improve compliance with such statutes, an environmental audit privilege is recognized to protect the confidentiality of communications relating to voluntary internal environmental audits.[42]

In addition, under Senate Bill 912 environmental audits are not admissible as evidence "in any legal action, or in any civil,

---

40 Id. at 9.

41 Two CEEC members are headquartered in two of these states; the others have operations in all four states.

42 Oregon Senate Bill 912, § 20(1).

criminal, or administrative proceeding."[43] The privilege does not apply where it is waived or where it is determined that the privilege was asserted for fraudulent purposes, the material is not subject to privilege or the material shows evidence of noncompliance with applicable law and no appropriate efforts were made to achieve compliance. Also, the privilege does not apply in criminal cases, where the material contains evidence relating to the commission of an environmental crime and the prosecution can show a need for the information and the information is otherwise unavailable.[44] Prosecutors may also obtain audits if they have probable cause based upon independent sources that an environmental crime has been committed.[45]

Moreover, under Senate Bill 912 the privilege does not apply to any material required to be collected, maintained or reported under applicable laws and regulations or any release subject to Oregon release reporting requirements, information obtained by agency observation or sampling, and information obtained from independent sources.[46]

Thus, the Oregon bill provides only a limited privilege. It does not in any way frustrate the state agency's ability to obtain information independently. Recently, the Kentucky and Indiana legislatures passed virtually identical environmental audit privilege statutes.[47] The Indiana statute differs slightly in that, if the noncompliance uncovered during the audit is the failure to obtain a required permit, the person must file an application for the permit within 90 days of the time the person becomes aware of the noncompliance.[48]

Finally, Colorado has enacted Senate Bill 94-139. With respect to the environmental audit privilege itself, the Colorado statute is slightly different from the other state statutes. Specifically, the Colorado Act provides that the audit report may be admitted into evidence if "compelling circumstances exist" or that "information contained in the environmental audit report

---

43 Id. at §20(2).

44 Id. at §20(3).

45 Id. at §20(4).

46 Id. at §20(5).

47 See Kentucky House Bill No. 681 (enacted March 29, 1994); Indiana Senate Enrolled Act No. 417 (effective July 1, 1994).

48 Indiana S.E.A. 417 §§4(b), 5(b).

contains a clear, present, and impending danger to the public health or the environment in areas outside of the facility property."[49] The Colorado Act also makes explicit that the privilege does not apply to documents existing prior to the commencement of and independent of the audit, documents prepared after the completion of and independent of the audit and information "that is developed or maintained in the course of regularly conducted business activity or regular practice."[50] The Act further provides that any party divulging information contained in an audit report that should have been privileged is liable for damages to the entity for whom the report was prepared.[51] Moreover, any public official who divulges information contained in an audit report that should have been privileged is guilty of a Class I misdemeanor and may be assessed a penalty of up to $10,000.[52]

The Colorado Act contains additional provisions. First, it provides that any party who assisted in the preparation of a privileged audit report shall not be required to testify without the consent of the entity for which the audit was prepared, unless ordered to do so by a court or administrative law judge.[53] Second, an entity which makes a disclosure arising out of a voluntary self-evaluation, where the entity has initiated efforts to correct noncompliance, is immune from criminal penalties for any negligent acts associated with the disclosure. The Act specifies which disclosures are considered voluntary.[54] This amnesty provision does not apply if a party has been found by a court or administrative law judge "to have committed serious violations that constitute a pattern or continuous or repeated violations of environmental laws, rules, regulations, permit conditions, settlement agreements, or orders on consent . . ."[55]

It is important to reiterate with respect to each state audit privilege statute that none provides an absolute privilege. Rather, the qualified privilege in each enables prosecutors to

---

49 Colorado Senate Bill 94-139 Section 1.

50 Id.

51 Id.

52 Id.

53 Id. at Section 2.

54 Id. at Section 3.

55 Id.

obtain the audit reports in specific cases, such as where the information is absolutely necessary but otherwise unavailable, or, in Colorado's case, where there is a clear and impending threat outside of the facility boundary. Moreover, in each statute, the privilege applies only if the regulated entity takes corrective action whenever an audit reveals noncompliance.

Audit privilege legislation has been introduced in a number of other states. The Illinois legislature introduced Senate Bill 1724 which provides a limited privilege for environmental audit reports. Under this bill, a party is not subject to a fine, penalty or other enforcement for violations discovered during a voluntary environmental audit. As with the enacted legislation, the privilege would not apply if asserted for a fraudulent purpose, if the material is not subject to the privilege, if the information is otherwise required to be made available under applicable laws, or if the information is obtained by the agency's own monitoring or from an independent source.[56] Similar bills have been introduced in several other states, including Pennsylvania, Virginia and New York. Most recently, Ohio proposed its version of a similar bill, H.B. 810, that is actively supported by the state Attorney General.[57] Thus, even the pending state legislation has been limited in scope to preclude application of the privilege under certain well-defined circumstances.

CEEC believes that a qualified environmental audit privilege will encourage companies to perform thorough and more frequent environmental audits, which will in turn allow them to better identify and more promptly correct their own compliance shortfalls. These efforts will undoubtedly have a positive effect on environmental quality, the protection of which is the primary purpose of environmental statutes and regulations. Thus, CEEC supports the states' efforts to establish a qualified audit privilege. CEEC hopes and strongly recommends that as a result of the dialogue that is commencing, the EPA will codify a self-evaluative privilege as part of its enforcement program, and that

---

56 See Chemical Week, at 50, June 8, 1994. Similar legislation was also first introduced in Arizona in 1989. While it to date has not successfully emerged, it is our understanding that new legislation will be introduced in the next legislative session.

57 An Ohio state legislative staff member indicated that the bill's sponsors are interested in modifying the current Bill to include additional auditing incentives for small businesses.

the agency will be in a position to work with CEEC and others to develop model state and federal legislation.

VI. CEEC Does Not Accept EPA's Stated Objections to State Auditing Privilege Legislation

In the Notice, the EPA notes that it has "consistently opposed" the States' enactment of an environmental audit privilege because of "the risk" that such legislation would:

- Weaken state enforcement programs.
- Impose unnecessary transaction costs and delays in enforcement actions.
- Potentially increase the number of situations requiring the expenditure of scarce agency resources, including the "overfiling" of state enforcement actions.[58]

At present, CEEC does not believe that the basis for any one of these concerns can in fact be established. More generally, OECA's objections improperly focus on enforcement, rather than on compliance, as the ultimate goal of environmental regulation. As Administrator Browner has emphasized, most companies are environmentally responsible and do not deliberately evade environmental requirements. CEEC believes that in setting its new environmental strategy the EPA must -- as these four states have done -- reduce the real and perceived disincentives to auditing.[59]

---

58 Notice, 59 Fed. Reg. at 31914. Four years ago former Assistant Administrator James Strock expressed the agency's concerns with a Colorado proposal to create a self-evaluative privilege. See February 14, 1990 letter from James M. Strock to Richard F. Mutzebaugh, Chairman of House State Affairs Committee in Colorado. See also, letter from Edward Reich, EPA Acting Assistant Administrator of Enforcement and Compliance Monitoring to the Executive Director of National Conference of State Legislatures. CEEC notes that although the EPA has consistently opposed state privilege legislation, the basis for its opposition is not always entirely consistent and we cannot find any indication that EPA has substantiated any of its enforcement concerns.

59 CEEC is also concerned about the EPA's threats to withdraw delegated authority from states that enact audit privilege legislation. For example, Gail Ginsberg, the Regional Counsel of EPA's Region V, by letter of January 19, 1994 to the Commissioner of Indiana's Department of Environmental Management, threatened to withdraw that state's delegated

Although CEEC is not aware of any data that would directly support the specific enforcement concerns referred in the Notice relating to the state privilege laws, as the dialogue moves forward we request that the EPA bring all such data to our attention. Additionally, we hope that the EPA is willing to balance the strong public interest in favor of protecting audit reports with any "enforcement concerns" that it believes it can substantiate. CEEC notes the significant monitoring and disclosure obligations on the regulated community that currently exist, and requests that OECA both identify any additional information it is concerned that it will not be getting if audits are protected, and discuss the significance of any such information.

VII. The Need for a Voluntary Disclosure Program

Although the Notice is entitled "Notice of Public Meeting on Auditing", the text of the Notice deals both with the protections to be afforded audit reports and questions related to voluntary disclosure. As CEEC noted at the outset of these comments, we are pleased that the EPA has recognized the importance of these two significant obstacles to enhanced compliance.

CEEC is also pleased that the EPA is reassessing its audit policy, and considering whether that policy -- which does not protect the confidentiality of audit reports -- is adequate, much less sufficient to encourage voluntary self-policing and the cooperation highly valued by Administrator Browner.[60] The 1986 Audit Policy focuses entirely on audit issues, as it encourages regulated entities to develop, implement and upgrade their environmental auditing programs. Nowhere in the July 9, 1986 Federal Register Notice is voluntary disclosure even mentioned. Thus, CEEC is especially pleased that the EPA is also focusing on the issue of voluntary disclosure as a part of this dialogue.

As EPA recognizes, once a violation is brought to a regulated entity's attention, and assuming that disclosure is not required,[61] the entity must decide whether to bring the violation

---

authority under various environmental programs if that state enacted a "privilege law". A similar threatening letter was sent by EPA Region VIII to Colorado's Governor.

60 It would be useful to review the Amoco-U.S. EPA "joint" pollution prevention project in Yorktown, Virginia as part of the upcoming dialogue.

61 In terms of developing a policy with respect to voluntary disclosure, it is worth noting that in some instances where

to the EPA's attention. As OECA states in the Notice, there is a need to evaluate whether "additional incentives are needed to encourage self-disclosure", not the least of which are increased recognition for voluntary disclosure and greater consistency of enforcement response. CEEC has reviewed issues related to voluntary disclosure for many months. We are convinced that there is a need for the federal government to implement a formal voluntary disclosure program in the environmental context. We have developed the elements of a proposed program following our review of other voluntary disclosure programs and a series of discussions with senior enforcement officials and other environmental policy makers. Before turning to the elements of our proposed program, in the next section CEEC briefly notes other federal voluntary disclosure programs that should be of interest to OECA.

VIII. Federal Voluntary Disclosure Programs

In the Notice, EPA indicated its interest in exploring "options which expand the approaches used in current EPA self-disclosure/penalty reduction programs (such as the Compliance Audit Program under Section §8(e) of the Toxic Substances Control Act.)" CEEC has serious reservations concerning the appropriateness and the utility of the TSCA §8(e) program as a model for any voluntary disclosure program. However, CEEC notes that other federal agencies have adopted voluntary disclosure programs, and it recommends that EPA move promptly to convene a task force consisting of representatives of those agencies and of regulated industry to consider the applicability of these programs in the environmental context.[62]

TSCA § 8(e) CAP. In February, 1991, the EPA announced a onetime voluntary disclosure program in order to obtain outstanding TSCA §8(e) data.[63] TSCA section 8(e) requires all manufacturers,

---

disclosure is required, such as under CERCLA § 103(b)(3), Congress has specified that it cannot be used against a person in a criminal case.

62 CEEC has unfortunately not had time to review these other federal programs in detail and its members are not necessarily familiar with all of them. CEEC does, however, look forward to reviewing these programs with the EPA as the dialogue progresses.

63 EPA recognized that "[u]p-to-date information to hazards and exposure is vital in supporting EPA efforts to protect human health and the environment." Notice of Registration and Agreement for TSCA Section 8(3) Compliance Audit Program,

importers, distributors or processors of chemicals that pose a "substantial risk of injury to health or the environment"[64] to immediately notify the EPA. The TSCA §8(e) voluntary disclosure program was initiated because of industry confusion over whether to disclose a study if a company was uncertain that the study was correct. In order to encourage companies to report all information on hazard and exposure (even if a study was questionable) EPA established a several-month period in which it allowed companies to enter into Compliance Audit Program ("CAP") Agreements. A CAP Agreement represented the complete settlement of all civil and administrative claims and causes of action under TSCA § 8(e) in connection with the submission of the information.[65] In exchange, companies were required to pay $15,000 per study for any study submitted to the agency involving effects in humans and $6,000 per study for any other study submitted to the agency.[66]

Thus, the CAP had a distinct purpose and was limited to a specific time-frame. Also, the program was quite narrow and the incentives were not sufficient to interest an overwhelming majority of the members of the regulated community. Finally, the TSCA §8(e) program cannot serve as a model for a number of other reasons, not the least of which are the differences with respect to the availability of criminal sanctions and citizens suits.

CEEC believes it is appropriate, therefore, to discuss several of the other voluntary disclosure programs that have been implemented by other federal agencies.[67]

DOJ Corporate Leniency Policy. On August 10, 1993, Anne Bingaman, Assistant Attorney General for the DOJ's Antitrust Division, announced an expansion of the Division's 1978 Corporate Leniency Policy. The expansion noted that "leniency" means "not charging a firm criminally for the activity being reported." The policy is intent on encouraging corporate self-policing and voluntary disclosure. Leniency procedures are specified. Corporations that come forward voluntarily will be offered "leniency" if certain

---

56 Fed. Reg. 4128 (1991).

64 TSCA §8(e); 15 U.S.C. § 2607(e).

65 56 Fed. Reg. 4129 (Feb. 1, 1991).

66 Id. at 4130.

67 CEEC is surprised that OECA did not reference these programs in its Notice.

requirements are met. The policy also extends to corporate directors, officers and employees who cooperate with the government and admit their involvement in illegal activity.

In announcing the extension of the Antitrust Division Policy at the meeting of the American Bar Association in New York City on August 10, 1993, Ms. Bingaman emphasized:

> We have concluded that counsel's current inability to guarantee amnesty to their clients if certain criteria are satisfied may be reducing the efficiency of the program. Therefore, we have decided to change the Policy in several respects (to guarantee amnesty in specific situations).

FAA Voluntary Disclosure Policy. The FAA's voluntary disclosure policy was instituted in 1990 after the agency realized that "air carriers and [others] could do more to monitor their own regulatory compliance." In implementing the policy, FAA officials emphasized that "because the air carriers have far greater resources than the FAA and because the issue of air safety is of paramount importance . . . they should have in place a procedure whereby internal compliance audits are performed." The Policy was designed to provide incentives for deficiencies to be identified and corrected by the companies themselves, rather than risk air safety by awaiting the results of an FAA inspection. FAA officials also emphasized that

> the enforcement program is not an end, but is rather a means to achieve compliance with the Federal Aviation Regulations . . . the FAA believes that aviation safety is best served by incentives . . . to identify and correct their own instances of noncompliance and invest more resources in efforts to preclude recurrence, rather than paying penalties.

Consequently, the FAA voluntary disclosure policy provides that enforcement actions will not be pursued if:

(1) The violation is reported voluntarily and promptly disclosed to the agency before the agency learns about it;

(2) The violation is not deliberate or intentional;

(3) The violation does not indicate a lack of basic qualification or a reasonable question of basic qualification to operate safely;

(4) Corrective actions are being implemented; and

(5) Remedial actions have been or will be taken to FAA's satisfaction to prevent recurrence of such violations.[68]

The OSHA Star Program. The U.S. Occupational Safety and Health Administration ("OSHA") first announced its Voluntary Protection Programs ("VPP") in 1982. This program allowed businesses with exemplary worker protection programs to enjoy a special regulatory relationship with the agency.[69]

As noted by Hunt and Wilkens, the most advanced of the VPPs, the Star Program, is available to companies that meet certain criteria, which establish management systems for preventing or controlling hazards, and which have a demonstrated history of compliance. In exchange for the company assuming primary responsibility for compliance monitoring at its facility, OSHA agrees to remove it from OSHA enforcement inspection lists, offer priority in variance requests and technical compliance assistance.[70]

As a result of the Star Program, OSHA has been able to reallocate its enforcement resources away from responsible members of the regulated community. Although in this respect, the Star Program is more akin to EPA's proposed Environmental Leadership Program than a self-disclosure program, the experience of OSHA and

---

68 Federal Aviation Administration, Compliance/Enforcement Bulletin No 90-6, March 29, 1990.

69 These three programs, entitled "Star", "Try" and "Praise", were implemented by a Notice of Voluntary Protection Programs, 47 Fed. Reg. 29025 (July 2, 1982). See, Hunt and Wilkens, Environmental Audits and Enforcement Policy, supra note 27, at 411.

70 Star companies are subject to a three-year inspection for "reverification" of their Star status. However, even when hazardous conditions are found, the company is expected to promptly eliminate the condition itself, without referral for an OSHA enforcement proceeding. Also, information voluntarily provided by the Star company is not shared with OSHA's Enforcement Office.

the regulated community with Star should be considered as EPA develops its voluntary environmental program.[71]

IX. Necessary Elements of a Voluntary Disclosure Program

As noted above, CEEC is pleased that the EPA and the DOJ have recognized the importance of voluntary disclosure and have attempted to create informal incentives.[72] CEEC believes that a formal voluntary disclosure program is necessary, pursuant to which the EPA would develop and issue guidelines specifying under what circumstances it will offer the assurance not to take criminal and/or civil enforcement action against those entities or individuals who qualify under the guidelines.

CEEC urges that these guidelines take into account situations in which members of the regulated community, in spite of best management efforts, have discovered during the course of self-review possible violations of environmental laws or regulations. While any entity or person that deliberately and intentionally violates the law should not be protected, the guidelines should provide that an entity (or person) reporting illegal activity before an investigation has begun will not be the subject of an enforcement action if all of the following conditions are substantially met:

- At the time the entity voluntarily comes forward to report the violation, the government has not received information about the violation from any other source. The disclosure must be timely, complete and prior to the agency obtaining knowledge of the violation, and would not include any disclosure already required by law, regulation or permit.

- The entity has demonstrated a strong commitment to environmental compliance. The key factor to be taken into consideration is the presence of an existing comprehensive environmental compliance program.

---

71 There are other federal voluntary disclosure programs, such as the Department of Defense Industries Initiative and a Nuclear Regulatory Commission program, that should also be examined as part of the dialogue.

72 As noted previously, the Department of Justice issued its Policy Statement on July 1, 1991 and Mr. Devaney released his memorandum regarding the exercise by the EPA of Investigative Discretion in Criminal Enforcement on January 12, 1994.

- Upon discovery of the violation the entity took prompt and effective action to terminate the activity and to prevent its recurrence.

- The entity or person reported the violation with candor and completeness, and cooperated with the government during the investigation.

- The entity initiated prompt action to remediate any environmental consequences of the violation.

CEEC believes that adoption of a voluntary disclosure program containing these elements will eliminate a key obstacle to the establishment of compliance programs. Such a program is consistent with this Administration's commitment to environmental quality and will ensure that the EPA's enforcement resources will be directed at entities and persons who are most in need of attention.

X. Conclusion

CEEC commends Administrator Browner and senior OECA officials for their decision to reassess EPA's Audit Policy and the need for a voluntary disclosure program. CEEC's members are committed to working closely with the EPA as these efforts progress, and to being active participants in the formal dialogue EPA is initiating with this Public Meeting.

PREPARED STATEMENT OF THE GOLF COURSE SUPERINTENDENTS ASSOCIATION OF AMERICA

Since 1926, Golf Course Superintendents Association of America (GCSAA) has been the leading professional association for the men and women who manage and maintain golf facilities in the United States and worldwide. From its headquarters in Lawrence, Kan., the association provides education, information and representation to nearly 16,000 individual members from more than 50 countries. GCSAA's mission is to serve its members, advance their profession, and enrich the quality of golf and its environment.

We appreciate the opportunity to provide testimony in support of S. 582, the Voluntary Environmental Audit Protection Act.

Many golf course suppliers and consulting firms offer environmental audits to golf courses, and we find them a useful endeavor. Some golf facilities are visited by government inspectors very often, and the audits help identify ways to reduce risk to the environment and improve compliance with federal and state law. However, volunteering to have an environmental audit conducted on golf course maintenance operations has some risks.

The immunity from fines offered by the Environmental Protection Agency encourages facilities to conduct audits and correct any potential violations. However, the lack of legal confidentiality of audit reports deters many courses from conducting audits voluntarily.

The members of GCSAA are concerned that anti-golf interests could subpoena the audit reports and use them to generate lawsuits against golf facilities. The golf course maintenance industry therefore has a strong interest in having protections under the law for this activity.

Senate Bill 582 would protect environmental audit reports from discovery in legal actions under certain circumstances. Violations must be voluntarily disclosed to appropriate federal or state agencies. In addition, efforts to achieve compliance must be promptly initiated. GCSAA believes this is a reasonable, effective way of addressing this issue.

The members of GCSAA urge the committee's support of this important bill. Thank you for your consideration of our views.

PERKINS COIE,
Washington, DC, June 4, 1996.

Re Comments of the Compliance Management and Policy Group submitted for the record on the hearing on S. 585 and Voluntary Environmental Audits, May 21, 1996.

Hon. CHARLES E. GRASSLEY,
U.S. Senate, Chair, Administrative Oversight and the Courts Subcommittee, Senate Judiciary Committee, Washington, DC.

DEAR SENATOR GRASSLEY: These comments are submitted on behalf of the Compliance Management and Policy Group ("CMPG").[1] The CMPG appreciates the opportunity to provide comments for the record in this hearing. The CMPG commends Senators Grassley and Kohl and the other members of the Subcommittee for conducting the May 21st hearing to solicit the views of the states and other interested parties on the issues underlying the legislation. The CMPG welcomes the Subcommittee's interest in improving the pending legislation so that it accomplishes its worthwhile goals most effectively while also addressing the legitimate concerns expressed at the hearing. Finally, the CMPG commends Senators Brown and Hatfield for introducing S. 582 and thus beginning movement toward appropriate federal legislation.

The CMPG is an informal industry coalition formed in 1991, to promote governmental policies that bring about (i) Higher compliance rates in the regulated community and (ii) greater fairness for those businesses that implement environmental audits and high quality environmental management systems in good faith. Such systems hold the key to the future of environmental protection, as they are more comprehensive than governmental enforcement can ever be. Such systems are designed to prevent noncompliance, as well as correcting it where it does occur.

The CMPG's views on the need for and the importance of federal legislation on issues relating to voluntary environmental auditing disclosure/immunity and privi-

[1] Members of the Compliance Management and Policy Group include: The American Forest and Paper Association, The American Petroleum Institute, The Chemical Manufacturers Association, The Boeing Company, and General Electric.

lege legislation are attached. The CMPG also believes that the efforts of the seventeen states that have passed legislation addressing these issues should be commended and that valuable experience can be gained by observing how these laws operate over the next several years.

The CMPG hopes that the attached comments will prove useful to the Subcommittee as it considers markup of S. 582. We would be happy to discuss specific changes to the legislation with you in further detail at your convenience.

Sincerely,

JAMES R. MOORE,
NANCY W. NEWKIRK,
Counsel for the Compliance Management and Policy Group.

PREPARED STATEMENT OF THE COMPLIANCE MANAGEMENT AND POLICY GROUP

Continuing Need for Federal Audit Disclosure and Use Immunity and Privilege Legislation

OVERVIEW

EPA's final policy on Incentives for Self-Policing: Discovery, Disclosure Correction and Prevention of Violations, (60 Fed. Reg. 66706–66712, December 22, 1995) became effective January 22, 1996.

Despite the new Policy, there remains a real need for federal legislation to provide (i) balanced incentives that encourage regulated entities to disclose voluntarily instances of noncompliance discovered either through an audit or as a consequence of a compliance management system; and (ii) limited privilege protection for members of the regulated community that move beyond required compliance monitoring and undertake voluntary audits to promote better environmental protection. Use of these tools by the regulated community will promote enhanced environmental protection. By itself, the EPA Policy cannot eliminate the impediments to improved environmental compliance currently created by our legal system.

Only federal legislation can provide: (1) criminal, civil and administrative penalty immunity in specified circumstances for environmental violations that are voluntarily identified, disclosed to U.S. EPA and expeditiously corrected; (2) use immunity to prevent information, that qualifies for penalty immunity from being used as a road map for litigation against the disclosing entity by other federal, state, and local authorities and third parties in civil enforcement actions, criminal proceedings, citizen suits, or other suits; and, (3) limited privilege under federal law.

EPA's Policy can only address penalty mitigation. It cannot provide: (1) penalty immunity because a policy is not binding, is merely guidance to the Agency, and cannot bind other federal, state or local regulatory agencies or prosecutors, or private third parties; (2) use immunity because this is beyond the authority of the Agency to provide, or (3) privilege because this is beyond the authority of the Agency to provide.

Any federal audit privilege and disclosure immunity legislation must strike a careful balance between creating incentives for regulated entities to expand and/or implement voluntary environmental self-auditing programs and compliance management systems, and the legitimate concerns of the public and the regulators about access to information and enforcement of environmental laws.

Such legislation should not interfere with the disclosure of information required to be disclosed under law; nor should it allow any company or individual that has willfully or deliberately violated any environmental law, or committed a violation that would cause substantial harm to human health, or that fails to correct promptly any noncompliance, to conceal its conduct or to have the benefit of penalty immunity.

Such legislation is not intended to be a deterrent to strong and effective enforcement of federal environmental laws; rather, it should allow enforcement efforts to be more effectively targeted on entities that have not voluntarily undertaken self-evaluation or have chosen to operate outside of the environmental regulatory system.

Seventeen states, to date, have enacted some form of audit privilege or disclosure/immunity legislation. Many other states are considering such legislation. States that have adopted such laws have done so in an effort to provide incentives for regulated entities that undertake voluntary self-audits and promptly correct any violations found. Rather than recognize the legitimacy of these state statutes, EPA and the Department of Justice have written and spoken against them with vehemence. EPA has threatened to deny Clean Air Act Title V delegation to some of these states.

Many of these state laws are quite recent and each must be evaluated individually; nevertheless, the CMPG believes that much useful information can be gained through the states' experience. EPA should respect the efforts of the states to try innovative approaches to environmental compliance and should not make the decision to deny delegation of Title V permit authority without awaiting the results of some actual state experience.

More detailed comments on these issues and a suggested approach to improving S. 582 are set forth below.

DISCUSSION

Need for Federal Legislation

In order to encourage the expansion of current efforts by the regulated community to undertake self-policing efforts directed at examining environmental compliance, there continues to be a need for federal legislation for penalty and use immunity for voluntarily disclosed violations and a limited environmental audit privilege. EPA's final Policy on Incentives for Self-Policing does not and cannot provide all the necessary incentives for voluntary actions undertaken by the regulated community to ensure compliance and to move "beyond compliance." The Agency's Policy only addresses limited penalty mitigation for voluntary disclosures.

Furthermore, the Agency has chosen to issue guidance, rather than adopt a binding rule. Thus, even the Agency is not bound by the penalty mitigation Policy and regulated entities have no enforceable rights under the Policy. Moreover, the Agency's guidance does not bind other enforcement authorities, such as federal, state or local prosecutors, or private third parties in citizen suits. Binding penalty immunity must come from legislation.

The Agency also does not have the authority to prevent the future use of voluntarily disclosed information against the disclosing entity (e.g., through litigation by third parties). This problem can be prevented by "use immunity" for voluntarily disclosed information. "Use immunity," which can only be provided by federal legislation, would enable information that is voluntarily disclosed to the Agency to be barred from use in litigation, except by the government when necessary to ensure that violations are resolved through injunctive relief.

Finally, the Agency does not have the authority to grant an environmental audit privilege. Establishment of a limited privilege must come from legislation.

Self-Policing Efforts Should be Encouraged by Federal Legislation

The Administration recognizes that expanding the current level of voluntary auditing and utilization of compliance management systems is important to the public interest to ensure compliance and environmental protection. In issuing its Incentives Policy, EPA stated, "* * * EPA realizes that achieving compliance also requires the cooperation of thousands of businesses and other regulated entities subject to these requirements." (60 Fed. Reg. 66706). Similarly, the Department of Justice, in a January 31, 1995 letter to EPA Assistant Administrator Steven Herman from Assistant Attorney General Lois Schiffer, said "[s]elf-auditing and other forms of self-policing can play a crucial role in promoting environmentally sound business practices."

The 1995 Price Waterhouse survey (The Voluntary Environmental Audit Survey of U.S. Business), referenced by EPA, confirms that many members of the regulated community view the lack of a federal audit privilege as a deterrent to the use of voluntary audits.[1] Fifty percent of the respondents who currently perform environmental audits said they would expand their audit program if a federal privilege law was passed. Close to half of all respondents indicated that their willingness to expand their audit program was affected by the fact that information could be used in citizen suits, toxic tort litigation, and civil or criminal enforcement actions. Eighty percent of the respondents who already perform audits indicated that pro-

[1]The Survey was sponsored by CMPG and several other leading industry coalitions interested in federal audit policy issues, a leading professional auditing association, and several corporations. Price Waterhouse was retained to perform the independent survey. Price Waterhouse identified and sampled a target population representing a wide range of U.S. company types, both large and smaller, but with at least 100 employees and annual sales revenue over $10 million, in diverse industrial manufacturing sectors, and including both companies which audit and those which do not audit. The majority of the companies contacted for the survey were randomly selected; the remainder were members of specific industry trade associations interested in the survey effort. Price Waterhouse contacted approximately 1,800 companies to participate in the survey, a total of 399 survey responses were timely received and, after screening the responses for completeness and consistency, Price Waterhouse utilized 369 for the survey study and report.

tecting audit information or holding it confidential was important to their companies.

Over the last four years, many states have recognized the positive advantages of encouraging voluntary auditing and 17 states, thus far, have enacted some form of a limited audit privilege and/or conditional penalty immunity legislation. Those state laws vary in their terms and in the limits and conditions placed on privilege and/or immunity. Each state law is effective only within the applicable state and for regulated entities that operate in more than one state, the incentives available under these laws, where they exist, differ from state to state.

Only federal legislation can effectively remove the remaining impediments to voluntary, "beyond compliance" efforts by the regulated community. For the reasons discussed below, EPA's Policy does not and cannot accomplish this.

1. Penalty immunity for voluntary disclosures—EPA policy does not provide the same degree of immunity against civil or criminal liability as would federal legislation

EPA's final Policy on Incentives for Self-Policing primarily addresses civil penalty mitigation for disclosure of voluntarily-detected information. The Agency has taken a significant step toward providing industry with incentives in this respect. However, because the Agency chose only to issue a policy, rather than binding itself with a rule, because of the inherent limitations on the Agency's authority, and because of the numerous and narrow conditions the Agency has imposed, the effectiveness of this step is limited.

EPA acknowledges that the governmental benefits from the assessment and correction efforts of companies that self-police and that such efforts are needed to augment government resources. The Policy states "because government resources are limited, maximum compliance cannot be achieved without active efforts by the regulated community to police themselves." (60 Fed. Reg. 66707). The Compliance Management and Policy Group supports EPA's goal of encouraging companies to undertake and expand their self-evaluation efforts and appreciates the efforts that the Agency has made to promote that goal. However, the Policy cannot eliminate the significant impediments that exist within our current system to voluntary efforts undertaken by companies, large and small, to improve their environmental compliance. Thus, federal legislation is still needed to help companies move "beyond compliance."

The Agency's Policy is only policy; it does not bind EPA and it does not bind other enforcement agencies—federal, state or local or private third parties. For this reason, industry cannot rely on the final Policy for consistent or equitable application. Such consistency and equity is essential to promoting broad disclosure. The Policy only provides guidance to Agency staff concerning the circumstances in which voluntary disclosure will result in waiver of 75% or 100% of the gravity-based component of an otherwise applicable civil penalty.

With regard to criminal prosecutions, EPA says that it will not refer cases involving corporations or other regulated entities to the Department of Justice ("DOJ") when the conditions of the Policy have been met, except in specified circumstances. While the Policy addresses circumstances when regulated entities may avoid criminal prosecution, it does not fully address how individuals will be dealt with by the Agency, particularly individual employees who conduct audits and resolve audit findings in good faith. EPA simply reserves the right to recommend prosecution for the criminal acts of individual managers or employees under existing enforcement policies. However, the EPA Policy does not bind either DOJ or the FBI, which are free to perform their own investigation and undertake an independent prosecution. The DOJ has expressed support for EPA's Policy, but continues to oppose audit privilege legislation and has stated that it will seek audit reports once an investigation has begun based on independent information. DOJ's July 1991 Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator memorandum—which is the closest thing DOJ has to a policy statement in this area—does not specify how its discretion will be exercised and also is not binding.

Likewise, the Policy does not bind state and local prosecutors, nor private individuals bringing citizen suits. Federal legislation is the only way to create certainty about whether and when companies and individuals will be exposed to criminal or civil liability for voluntary disclosures. Again, certainty is crucial in this area where the stakes are so high. In no other area of the law, for example, can felony criminal sanctions be imposed on a strict liability basis.

2. Use immunity—EPA policy cannot address the concern that voluntarily disclosed information may be used against the company

The Compliance Management and Policy Group favors the concept of openness with government and their community. We would like to be in a position to utilize audits and compliance management systems to disclose to EPA problems found and corrected. However, our members have legitimate concerns that even if they receive penalty mitigation from EPA, others will target them for litigation, using the company's own self-disclosed information against it. The Policy does not address this very real concern.

When information is disclosed to EPA under the Policy, even if EPA agrees to take no further enforcement action, it becomes public information. It is available for federal and state prosecutors, state enforcement agencies, local enforcement officials and citizens to use in litigation: i.e., civil or criminal proceedings, citizen suits, and other suits. No other area of law presents such multiple opportunities for liability. Again, certainty and uniformity are crucial to promoting significant amounts of disclosure.

To truly foster the voluntary disclosure of information gathered in self-policing effort, federal legislation is needed to preclude the use of this information in third party proceedings. Granting such "use immunity" for voluntarily disclosed information is beyond the authority of the Agency to address. The use immunity concept that CMPG supports would be limited to the information disclosed; would not preclude a third party action based upon other available information, and would not apply to injunctive proceedings to resolve any continuing adverse environmental effects.

3. Limited environmental audit privilege—EPA policy provides no protection for analytical and evaluative documents

Clearly, greater openness and disclosure by members of the regulated community is a trend that will only increase. As noted earlier, CMPG members support and are participating in this trend. On the other hand, not every single item of information generated within an organization is properly public information. Voluntary internal evaluations of environmental compliance and liability are justifiably confidential, particularly given the uniquely severe consequences of such liabilities. If persons involved in such evaluations believe they may be made public, they are much less likely to be candid and clear. As a result, the materials they prepare are less effective, to the detriment of environmental performance.

Large entities already have some ability to generate self-evaluative information under the attorney-client privilege, but at considerable expense and with some uncertainty. This requires an attorney's involvement in directing the audit, rather than leaving the audit in the hands of the entity's engineers and environmental compliance managers. The attorney-client privilege is also subject to very technical requirements that limit the utility and availability of the audit report. With federal audit privilege legislation, these audits can be conducted without the expense of an attorney and without the fear of increasing the company's potential liability, thus greatly expanding the universe of companies able to implement audits to include smaller companies.

While EPA says, in the Policy, that it will not routinely seek audit documents, this assurance is largely undercut by EPA's reservation of the right to seek audits whenever it has any other reason to suspect noncompliance has occurred. Moreover, EPA continues flatly to oppose the basic concept of a self-evaluative environmental audit privilege.

A limited federal environmental audit privilege would provide the regulated community with needed flexibility and make more information available within the entity for its use in improving its environmental performance. Regulated entities would be able to conduct more environmental audits and address environmental performance issues more candidly in audit reports, if environmental audit reports were privileged. No information already required by law to be reported, collected or maintained should be subject to the privilege. Regulated entities would still disclose all information required by rule or permit to be reported to EPA, the state or local governments. However, a regulated entity would be able to disseminate more information internally without fear of increasing its potential liability. The audit privilege would only be available if the entity promptly initiated and continued appropriate corrective actions to resolve any instances of noncompliance that it found.

Issues to be Addressed by Federal Legislation

The CMPG commends the Subcommittee for conducting the May 21 hearing and for moving forward with the concept of federal legislation addressing auditing and

disclosure. CMPG also commends the Subcommittee for its evident desire to improve S. 582 so that it accomplishes its worthwhile goals most effectively while also addressing the legitimate concerns expressed at the hearing. A number of legitimate issues have been raised about the bill currently under consideration. As the debate has matured and a number of states have adopted audit privilege and/or disclosure immunity laws, it has become evident that only legislation that carefully balances the desire of the public to be informed, the need for enforcement, and the concerns of the regulated community can be enacted.

To that end, we would like to set forth some principles that we believe any such legislation should address. We offer some suggestions about how these issues might be handled, but are open to discussion and debate. We have not endeavored to be totally inclusive here and have not, for example, included exceptions from the privilege provisions of S. 582 that are already in the bill and have not proven controversial, such as the exception for information obtained by a regulatory agency through its own observation, sampling or monitoring. We agree with those.

I. Voluntary Disclosure/Penalty Immunity Issues

The penalty immunity available should be a qualified one.

No immunity from prosecution should be available for an individual or an entity that commits intentional and willful violations.

Civil sanctions should be imposed if the violation was committed intentionally and willfully by the person or entity making the disclosure.

Criminal sanctions should be imposed: against a disclosing person, where the person committed or aided or abetted the commission of the disclosed violation intentionally and willfully or where the disclosed violation constituted a knowing endangerment offense within the meaning of the Clean Water Act, the Clean Air Act, or the Resource Conservation and Recovery Act, and the disclosing person knew at the time of the illegal activity that such activity would place another person in imminent danger.

Against a disclosing entity, where the disclosed violation was committed intentionally and willfully by a member of the entity's senior management (or in the case of a knowing endangerment offense under the above laws, a member of the entity's management knew at the time of the illegal activity that such activity would place another person in imminent danger) or the entity's policies or lack of preventive actions or system contributed materially to the occurrence of the violation.

A penalty imposed under these circumstances should, to the extent appropriate, be mitigated due to factors relating to the nature of the violation, circumstances of disclosure, efforts by the disclosing party to prevent or resolve the violation and other relevant considerations.

Government agencies should continue to exercise injunctive authorities in order to protect the public and environment. Agencies should have full injunctive powers to remedy any continuing adverse public health or environmental effect of a violation. We believe nothing in S. 582 as currently drafted impairs this ability.

Government agencies should have full enforcement authority to enforce the terms of any agreement entered into between the disclosing person or entity and the government with regard to corrective action to address the violation.

In order to provide the incentives of penalty protection to entities that take the greatest measures to ensure continued compliance, voluntary disclosures arising out of the operation of a voluntary compliance management system, as well as a voluntary audit, should qualify for penalty protection. (Compliance management systems include steps to prevent violations from occurring in the first place: policies, standards and procedures, such as hotlines; clear assignment of responsibility; management and tracking systems, worker training; incentives and accountability; and other features that produce a high rate of compliance systematically and continuously.) EPA has recognized the value of compliance management systems in its Policy.

The concept of limiting the availability of immunity for "repeat violations" should be clarified so that corporate or governmental entities with multiple facilities are not needlessly precluded from the incentives to expand or institute self-audits or compliance management systems. To this end, only a pattern of significant violations of federal or state laws, due to separate and distinct events, occurring at the same facility and violating the same requirement, during a three-year period prior to the date of disclosure, should be considered. Additionally, similar violations at multiple facilities may constitute a pattern, if senior management of the common owner or operator had actual knowledge of the violations and failed to timely corrective measures.

To allow for certainty as to when a disclosure, presumed voluntary, will be considered voluntary, a reasonable period of time should be provided to the regulatory

agency to which a written disclosure is made, to respond in writing disputing immunity. Otherwise, the presumption of immunity should attach.

An alternative should be available to a court challenge for purposes of resolving disputes regarding the presumption of immunity. If the regulatory agency and the disclosing party can resolve this in the course of settlement discussions that should suffice.

Where there is a continuing dispute regarding whether the disclosure qualifies for immunity, that issue should be resolved by an independent decisionmaker, either the court or an administrative law judge, after an opportunity for an evidentiary hearing. S. 582 places the decision in the hands of the head of the federal agency seeking to impose penalties; this is inappropriate. An independent review provides assurance to the regulated entity that its efforts to make a voluntary disclosure will be recognized and ensures fairness in the process.

II. Use Immunity Issues

In order to ensure that disclosed information qualifying for penalty immunity is not used against the disclosing entity by third parties, the disclosed information should not be admissible against that person or entity, except for purposes of seeking injunctive relief to remedy any continuing adverse public health or environmental effect of a violation. Third parties are free, however, to bring actions based on other information available. We believe that disclosure and the consequent availability of the disclosed information to the public, coupled with "use immunity," is a more open and preferable approach than that taken by S. 582 at § 3803(a). That section appears to provide that a qualifying voluntary disclosure to a federal or state agency should also be subject to the evidentiary and testimonial privilege protections and, thus, kept secret from public.

III. Evidentiary Privilege Issues

The privilege should not extend to any document, communication, data, report or other information required to be collected, developed, maintained or reported to a regulatory agency pursuant to federal law.

To ensure that direct eyewitness field observations are not shielded by the privilege, there should be an exception to the privilege for documents, or portions thereof, containing direct eyewitness field observations (by sight, smell, hearing, or touch) relating to regulatory compliance made by the person who conducted the voluntary audit during the course of the field investigation portion of the audit. (Documents, or portions thereof, containing judgments, evaluations or opinions by such persons in the context of the audit would be privileged.)

The privilege should not extend to an audit report prepared for the purpose of avoiding disclosure of information required for a governmental investigative, administrative, or judicial proceeding that, at the time of preparation, was imminent or in progress.

So as to enable an entity or person to address issues raised by the audit, the privilege should not be deemed to have been waived by disclosure of audit information to persons employed by or business partners of the entity or person for whom the evaluation was conducted.

Because audits are frequently required in business transactions and such audits lead to improved environmental performance, the privilege should not be deemed to have been waived by disclosure of audit information subject to a confidentiality agreement between the person or entity for whom the audit was conducted and business associates or potential business associates, lenders/insurers or potential lenders/insurers, or transferees or potential transferees.

In order to avoid costly litigation where possible, claims of privilege or efforts to obtain information claimed to be privileged should be reviewable by either a court or an administrative law judge, as appropriate. S. 582 currently only provides for judicial review of such issues.

IV. Testimonial Privilege Issue

To ensure that direct eyewitness observations are not shielded by the privilege, there should be an exception to the privilege to allow the person who conducted the voluntary audit to be compelled to testify as to any direct eyewitness observations (by sight, smell, hearing, or touch) relating to regulatory compliance made by that person during the course of the field investigation portion of the audit. (However, any judgments or evaluations or opinions by such person in the context of the audit would be privileged and could not be compelled.)

V. Additional Statutory Issues

To ensure consistency under consistent laws, the provisions of the federal legislation should extend to federally delegated or approved programs implemented by states, although states should be free to offer greater protections.

The definition of "covered federal law" should be expanded to include four other laws typically covered by environmental audits and which impose broad environmental requirements on regulated entities: the Endangered Species Act; the Surface Mining Control and Reclamation Act; the Rivers and Harbors Act; and the Hazardous Materials Transportation Act.

Enforcement actions precluded by a qualifying voluntary disclosure should include not only penalties, but also listing, debarment and suspension from government contracts. These issues are of great importance to government contractors and their self-evaluation efforts should likewise be encouraged. Moreover, to qualify for disclosure immunity, the disclosing entity must correct the violations, which is the same test for lifting any otherwise applicable suspension/debarment.

"Compliance management systems" should be defined. The EPA definition of a "due diligence" system used in its Policy is an appropriate one to adopt.

State Audit Privilege and Immunity/Disclosure Laws

The concept of encouraging voluntary self-evaluation by regulated entities and protecting their efforts to find and correct instances of noncompliance has met with great interest in the states over the last three years. As Senators Brown and Hatfield pointed out in their remarks at this Hearing, Oregon was the first state to adopt an environmental audit privilege law in 1993, followed, in 1994, by Colorado which adopted the first environmental audit privilege and immunity/disclosure law. Each Senator emphasized that his state did so based on a long tradition of being environmental active and concerned about improving the performance of regulated entities within their jurisdictions. Each state was interested in trying an innovative approach to increasing environmental compliance and in providing incentives to entities that made efforts to ensure compliance that went beyond the requirements of existing law.

Since Oregon and Colorado passed their legislation, 15 other states have enacted varying forms of environmental audit privilege and/or immunity/disclosure legislation. Experience under these laws is fairly limited, as so many of them are less than two years old. The CMPG believes that it is important to allow states to experiment with incentives to voluntary self-compliance and that states should be encouraged in their efforts.

In no case, does the CMPG believe that environmental enforcement should be compromised or public health and safety jeopardized. However, despite the outcries of EPA and DOJ, no concrete examples have been provided where this result is threatened. As far as we are aware, while each state law must be examined on its own merits, every state law excludes from coverage of any audit privilege information that must be reported, collected or maintained under existing law, and no state disclosure/immunity statute interferes with the state's authority to issue emergency orders or to require injunctive relief.

EPA has threatened to deny Clean Air Act Title V delegation to those states with audit privilege and/or disclosure/immunity statutes where EPA determines that the state statute may "deprive the state of adequate authority" to enforce the Title V permit program, as required by Section 502(b)(5) of the Clean Air Act. *See* EPA Memorandum "Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements" (April 5, 1996). The EPA Memorandum sets forth numerous criteria for use by the EPA Regions in determining whether or not a state has the requisite authority. Section 502(b)(5), however, is a relatively straightforward and short section of the Clean Air Act which simply requires a state with a delegated Title V program, among other things, to have adequate authority to issue, revoke and modify permits, assure compliance with the permits, and enforce the permits through both civil and criminal penalties. The validity of EPA's effort to invest this requirement with the level of detail exhibited by the criteria in the EPA Memorandum is questionable. It is not at all clear that this section of the Clean Air Act actually requires each of the elements set forth in the EPA Memorandum.

The CMPG commends the Subcommittee for eliciting testimony of two states, Colorado and Texas, about their experience with their state statutes. We believe that such information from the states with audit privilege and disclosure/immunity legislation will help inform the debate.

PREPARED STATEMENT OF HARRY H. KELSO, DIRECTOR OF ENFORCEMENT AND POLICY, VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY

Good morning. My name is Harry Kelso, and I serve as Director of Enforcement and Policy at the Virginia Department of Environmental Quality, the agency of the Commonwealth of Virginia charged with environmental regulation, permitting, and enforcement.

BACKGROUND OF AUDIT DEBATE

As background, the issue of environmental audits and any protections afforded therefrom, have been the subject of debate within the federal government at least since EPA issued its Audit Policy of 1986, in which it sought to achieve an appropriate balance between its desire to detect violations and its concurrent desire to encourage industry to conduct audits, uncover environmental problems, and to correct them. Demonstrating the federal government's skepticism about any audit privilege, the Assistant U.S. Attorney General for the Justice Department's Environment Division wrote a March 1989 letter to the Attorney General of Arizona expressing the Department's serious concerns regarding proposed Arizona state legislation which would have established a privilege arising out of environmental audits. Specifically, the Assistant Attorney General articulated the Department's view that a privilege against disclosure of internal company environmental audits could hinder effective state and federal enforcement of environmental laws and, moreover, could deny government officials the requisite access to information essential to meeting their statutory charge of protecting public health and the environment. Furthermore, the Assistant Attorney General reasoned that such entities are afforded protections by and through existing privileges, including the attorney-client and attorney work product privileges.

Since 1989, similar letters from the federal government, usually from different officials at EPA, have been sent to officials of various states contemplating environmental audit legislation. The federal responses, uniform in their strident tone against such audit legislation, ranged from threatened increased federal enforcement in delegated environmental programs to pledges to cutoff funding for delegated grant mandates. The Commonwealth of Virginia was the recipient of one such "warning shot": in the midst of last year's legislative debate in the Virginia General Assembly over this issue, Virginia Department of Environmental Quality Director Peter Schmidt received such a letter from EPA. Despite this EPA warning, the General Assembly shortly thereafter passed the state environmental audit legislation and Governor George Allen signed it into law. In March, only weeks after legislative passage of the Virginia legislation, President Clinton reversed the EPA posture in announcing his new position, which recognized a different federal attitude—one of cooperation and incentives for good behavior, rather than relying solely on a "command and control" approach. This new Clinton policy includes incentives for environmental compliance, including a 180 day enforcement grace period for small businesses and an effort to seek reduced penalties for companies which voluntarily disclose and correct violations. Last December, EPA issued a new policy that reflects the federal government's much-welcomed change of heart which recognizes the legitimate environmental benefits which can be gained from providing incentives for pro-active environmental assessment and compliance. The new EPA policy does not go far enough; every lawyer knows—particularly litigators—that courts are guided by statutes and regulations; policies, particularly those that have not completed notice-and-comment rulemaking, are little more than weak authority in courts. Without statutory relief via an audit privilege, the private sector cannot be expected to take the bold risk of discovering and divulging their own environmental problems.

NARROWLY TAILORED PRIVILEGES AND IMMUNITIES

The metamorphosis of the debate over environmental audits and privileges begins with the well-settled legal proposition, articulated by the U.S. Supreme Court, that the creation of evidentiary privileges contravene the fundamental principle that the public has a right to every man's evidence [and therefore should be] strictly construed. *Trammel* v. *U.S.,* 445 U.S. 40 (1980) and *U.S.* v. *Nixon,* 418 U.S. 683 (1974). Recognizing this policy of narrow privilege construction, there is considerable precedent in U.S. jurisprudence for the creation of limited privileges. Most—if not all—privileges afforded in common law and federal law are very limited in scope and are constructed to achieve three goals: First, the goal of maintaining the confidentiality and sanctity of particular relationships. Examples include the marital privilege, attorney-client and attorney work product privileges, doctor-patient privilege, and clergy-parishioner privilege. Second, these privileges are also constructed in order

to encourage the frank discussion of difficult problems without the fear of outside publication or activity. It should be noted that even the federal government itself enjoys certain privileges shielding government documents from publication, embodied in the multiple exceptions to the Freedom of Information Act. A key example is the "deliberative process" privilege, which ensures the robust, open debate that regularly occurs in government agencies over the development of policies and regulations. The Commonwealth of Virginia's own Freedom of Information Act encapsulates similar limited privileges. Finally, and most relevant to our current topic, privileges are established to ensure that total system efficiencies are gained. In this case, the system we are concerned with is the environment. The environmental audit privilege is designed to ensure that we reap maximum environmental benefits while balancing our need to ensure that environmental strictures can be appropriately enforced. Thus, there is clear trail in U.S. jurisprudence for the enactment of certain limited privileges.

As a statutory policy goal, we are convinced that encouraging environmental audits and proactive efforts to correct environmental violations will inevitably result in regular and broader industry compliance. Already, industry is responding positively this forward-thinking approach. Simultaneously, we are revisiting our own state agency enforcement structure and making more staff available for compliance assistance in our regional offices, while also maintain the traditional enforcement mechanisms for recalcitrant violators. Thus, instead of relying solely on the more cumbersome enforcement efforts, this approach will augment the traditional enforcement tools and lead to more statutory and regulatory compliance, meeting the requirements of the different environmental laws.

Virginia Legislation

It was in this narrowly-constructed context, as well as following the enactment of similar legislation in several other states, that the Commonwealth of Virginia enacted its own environmental assessment legislation earlier last year. It provides incentives for voluntary disclosure and pro-active environmental corrections, based on the view that if an entity takes the initiative to determine any environmental compliance problems, cleans them up expeditiously (usually at considerable cost), and reports such to regulatory agencies, then the environment and public health are the clear beneficiaries. The Virginia law, of course, does not in any way abrogate or relieve an entity from doing what it is required to do by statue, regulation, order, or permit. The 1995 Virginia legislation is similar, in great part, to the legislation sponsored by Congressman Hefley, and Senators Hatfield, Brown and Lott. The key elements to the Virginia legislation are:

1. to authorize a limited privilege for documents collected, generated or developed during an environmental assessment;
2. to create a mechanism for enforcing the privilege and determining those documents which are covered by such privilege; and
3. to establish a limited immunity against civil administrative or judicial penalties for violations disclosed voluntarily and corrected diligently.

During the legislative debate in the Virginia General Assembly, it was the privilege and the immunity, albeit limited,which prompted the most significant questions.

1. With respect to the privilege shielding the publication of an environmental assessment, the Virginia law limits the privilege as follows: the privilege does not extend to a document which demonstrates a clear, imminent, and substantial endangerment to public health or the environment; the privilege does not extend to documents required by law; the privilege does not extend to documents prepared independently of the voluntary environmental assessment process; the privilege does not extend to documents collected or generated in bad faith; the privilege does not alter, limit, waive, or abrogate any other statutory or common law privilege.
2. With respect to the immunity afforded against civil penalties for voluntarily disclosed violations, the Virginia law limits the immunity as well: the immunity must be consistent with requirements imposed by federal law; the immunity cannot be afforded if the voluntary disclosure of information is already required by law, regulation, permit or administrative order; the immunity cannot be afforded unless the voluntary disclosure of an environmental violation, provided to a state or local government agency promptly after learning of the violation from an environmental audit, is followed by correction in a diligent manner in accordance with a compliance schedule submitted to the agency; the immunity cannot be afforded if the voluntary disclosure has been made in bad

faith; the immunity section does not bar the institution of a civil action claiming compensation for injury to person or property against an owner or operator.

In light of the limited environment and compliance resources available to government agencies, together with the widely-utilized mechanism of self-reporting and self-policing found in the environmental statutes, the Commonwealth embarked upon a policy based on the goal of ensuring environmental compliance through the utilization of multiple tools—including voluntary environmental assessments—as opposed to relying solely on the traditional and cumbersome enforcement approach. Furthermore, as the statutory limitations show, there are clear safeguards to prevent environmental "bad actors" from misusing this privilege or immunity. Moreover, Virginia's audit privilege law has overcome the chilling effect that traditional enforcement measures have on aggressive, voluntary environmental compliance efforts—a fundamental fact that the new interim EPA policy fails to recognize. In short, we believe that systematic, and industry-wide environmental compliance will be far better served with the immunity provisions similar to the Virginia law.

H.R. 1047 and S. 582

The components of Congressman Hefley's bill, as well as Senator Hatfield's and Brown's bill, are very similar to the three components to the Virginia legislation: a limited evidentiary privilege; a mechanism for enforcing the privilege and determine those documents which are covered by such privilege; and limited immunity. Both bills remain in the Judiciary Committees of their respective houses.

Conclusion

The creation of a limited environmental audit privilege and limited environmental immunity will be an incentive to encourage businesses to conduct thorough and frequent self-audits with respect to the environmental aspects of their operations. By removing the disincentives that currently exist for "good actors" to put their environmental house in order, improved environmental management and the reduced possibility of insult to the environment and public health will necessarily occur. These strides will serve as a dramatic step towards rewarding the pro-active, systematic, private-sector-led environmental improvements and away from relying solely upon the traditional notions of the command and control regulatory scheme.

Prepared Statement of Pam Kautter, Western Colorado Congress

My name is Pam Kautter. My husband of 25 years and I live in Durango and I'm a lifetime resident of Colorado. I've been involved since 1990 in attempting to deal with the environmental and human health impacts of coalbed methane development in the San Juan Basin. As such, I have first hand experience working with small and large corporations.

I am submitting this testimony on behalf of the Western Colorado Congress (WCC). WCC is a citizens' organization with seven local chapters and 1,300 members based in western Colorado. Our members have a long history of promoting environmental and economic justice and holding corporations accountable for their actions. The legislation you're considering today is of great interest and concern to our members because it will reduce opportunities for citizens to learn about health and environmental hazards in their communities and work for safer alternatives.

WCC is also part of a six-state federation of community based organizations called the Western Organization of Resource Councils (WORC). In addition to WCC, groups that comprise the WORC federation include the Idaho Rural Council, Dakota Resource Council (North Dakota), Dakota Rural Action (South Dakota), Powder River Basin Resource Council (Wyoming) and Northern Plains Resource Council (Montana). I am submitting this testimony on their behalf as well.

In a nutshell, S. 582 would give companies that voluntarily disclose violations identified through "environmental audits" immunity from administrative, civil and criminal penalties, as well as deny citizens access to "environmental audit reports" (otherwise known as a privilege). Industry representatives argue that these measures are needed to improve environmental compliance and performance. However, our 15 years of experience dealing with corporations has shown us that openness and accountability, not secrecy and special privileges, will promote greater compliance with laws designed to safeguard people's health and the environment.

S. 582 is similar in many respects to a Colorado statute (SB 94–13) which was enacted into law in 1994. We understand that you will hear from witnesses today who will sing the praises of the Colorado law. We thought you should hear another point of view. Thus we offer the following critique of Colorado's statute.

CRITIQUE OF COLORADO'S "ENVIRONMENTAL SELF-EVALUATION LAW"

The Colorado law allows companies to voluntarily self-evaluate their operations, disclose any violations they discover and receive immunity from administrative, civil and/or criminal penalties for those violations. The Denver Post reported on April 21 that 16 companies have so far "confessed" violations to Colorado regulators and been granted immunity from penalties. Most of the violations disclosed by companies in Colorado under the statute have been to the state's Air Pollution Control Division.

A. Some self-disclosures raise questions

The circumstances surrounding some of the company self-disclosures raise serious questions about the viability of the Colorado law. For instance, Golden Aluminum, a company formerly owned by Coors, the law's biggest advocate, disclosed that it was discharging nine times more pollution than the law allows, or 45.3 tons per year of volatile organic compounds. Western Mobile Inc., a gravel quarry operator disclosed what is probably quite obvious to its neighbors—it appears to be emitting more particulates into the air than allowed by law at five different gravel pits in the state.

Under SB 94–139 the state's hands are tied. It can develop corrective action plans with companies that self-disclose violations, but it cannot evaluate whether the company gained a financial edge over its competitors by its long-standing violations. So, under the law, these companies may be permitted to pocket ill-gotten gains from years of under-investment in pollution control and monitoring.

Those who are hurt include neighbors who may find the laws are no longer as enforceable as they used to be, and "good actor" companies which had to spend more money all along to keep up with legal requirements.

B. Broad immunities undermine enforcement

We are convinced the Colorado statute is in direct conflict with federal law requiring states to demonstrate adequate enforcement authority when federal programs are delegated to them for implementation. In particular, it appears to us that the broad immunities encompassed in SB 94–139 undermine the penalty authority provisions in the Clean Air Act.

These broad immunities eliminate the ability of the state to assess penalties when companies gain an economic advantage over competitors by delaying their investment in compliance. This means enforcement in Colorado is weaker than enforcement elsewhere where such constraints do not exist.

For the record, we support giving companies that act responsibly a reduction in civil (but not criminal) penalties. The penalty reduction provisions in the Environmental Protection Agency's new "Incentives for Self-Policing" policy are a positive step that we endorse.

We strongly object, however, to companies receiving immunity from penalties for violations which allow them to pocket the savings from extended periods of noncompliance and gain and economic advantage over law abiding competitors.

C. Privilege gives companies the right to conceal information

Immunity from penalties for self-disclosed violations is only one of many provisions in the Colorado law. Of equal concern to our membership is that of privileges for "environmental audit reports," which is a separate and independently operable part of the law. In other words, the statute gives companies the right to conceal environmental audit reports from the public and government.

Colorado's law states that "an environmental audit report is privileged and is not admissible in any legal action or administrative proceeding and is not subject to any discovery pursuant to the rules of civil procedure, criminal procedure, or administrative procedure * * *" While the statute spells our some exceptions to this privilege, in our view the need for a public right to know far outweighs any corporate arguments for confidentiality.

Under the statute, many documents could be stamped as an "environmental audit report" and essentially kept off limits to persons outside the company. Because this point is so important, let us state it another way. Colorado's law allows companies to choose not to disclose information on violations, but rather withhold this information under the protective shield of an "environmental audit report."

While companies still have a duty to meet current legal reporting requirements, there's nothing in the Colorado statute that requires companies to report violations they discover through the self-evaluation process. Thus, companies can readily hide information from government regulators and people who are affected by pollution by defining studies they conduct in the future as confidential "environmental audit reports."

For every company that reports a violation, a hundred more may use the law as a means of concealing rather than revealing violations. To make matters worse, it is very difficult to know which companies are using the privilege to shield violations unless they volunteer the information or claim the privilege in an enforcement action or in litigation. As concerned citizens, what we don't know can't hurt us.

D. Whistleblower sanctions hinder enforcement

Yet another provision in the Colorado statute will send a chill down the spine of any whistleblower. The statute states that any "person or entity" (including a company employee) who divulges all or part of an environmental audit report is liable for damages. In other words, consider the situation in which the neighbors of a factory receive information from a company employee that their community is being poisoned by toxic pollution from the factory. The information is part of an "environmental audit report" the company conducted. If the neighbors sue the company for $1 million in personal injuries and win, the company can apparently turn around and sue its employee for the amount of those damages. This provision of the law punishes good citizenship and ethical behavior by forcing employees to keep their mouths shut even in cases where people's health is endangered.

The Colorado law further states that any public employee or official who divulges all or part of an "environmental audit report" is guilty of a Class 1 misdemeanor and subject to a $10,000 fine. This provision essentially mandates that government employees keep company wrong-doing secret from the public. In contrast, public records laws give officials discretion to withhold such information for purposes of enforcement. Making the withholding of information mandatory drives a wedge between the government and the public. Not only does the company get away with its violations, but government officials become less accountable for the knowledge they obtain in an audit report.

For all of the above reasons, we believe these sanctions are inconsistent with an adequate enforcement program and federal whistleblower protection laws. In summary, we conclude that SB 94–139: undermines federal Clean Air Act enforcement powers and perhaps other federally delegated environmental programs, and hinders public and agency access to vital information, including evidence of misconduct, under the cover of "environmental audit reports, and imposes sanctions on persons who disclose environmental audit reports that are inconsistent with the adequate enforcement of federal environmental laws.

S. 582 ENCOMPASSES SIMILAR FLAWS

In reviewing S. 582, we discovered it has many of the same flaws as the Colorado statute including broad immunities for violations found through environmental audits and a sweeping privilege. Thankfully, it does not include SB 94–139's sanctions against whistleblowers.

We want to emphasize once again our opposition to any sort of an audit privilege. The concerns of corporations that audit information will be used unfairly or used to harass responsible corporate citizens do not, in our view, outweigh the needs of citizens to have access to information which may directly affect their health and welfare. In effect, S. 582 puts the private interest of corporations ahead of the public interest.

Companies are quick to argue that environmental audit privileges will lead to better compliance with environmental laws. We see this argument as a smokescreen. Our sister group in Montana, the Northern Plains Resource Council (NPRC), is currently involved in negotiations on the need for environmental audit privileges in that state. NPRC's representatives to these negotiations have concluded that many companies are really motivated by a desire to hide information from citizens and public officials and sidestep liability for harmful activities and operations.

Rather than create a new category of secret information we suggest that S. 582 embrace the opposite approach by requiring that all environmental audits, voluntary or otherwise, have strong public and work force right to know requirements.

Finaly, we would like to point out that the term "environmental audit" as defined in S. 582 is very broad and open to interpretation (as is the definition in the Colorado statute). Such a definition could result in large amounts of corporate information being withheld from the public.

CONCLUSION

We support incentives that encourage companies to conduct environmental audits and clean up their own act. Surely, however, a policy can be designed that meets this goal without the need for broad immunities or sweeping privileges.

Reggie James, acting director of the Southwest Regional Office of Consumers Union, had this to say about laws which grant companies the right to keep environmental audit reports confidential. "What we have now is two privileges that can be abused rather than just one," he said, referring to attorney-client and audit privileges.

Robert Friedland, co-founder of Galactic Resources, the parent company of Summitville Consolidated Mining Company, reinforces the wisdom behind James' point. Summitville abandoned its cyanide heap leach gold mine near Del Norte, Colorado, in 1992. The Environmental Protection Agency took over, and the mine site became the state's best known Superfund clean-up project.

According to an article in The Denver Post on May 15, Friedland and three other former directors of Summitville have filed a lawsuit in Canada seeking to keep piles of information on the mine marked "attorney-client privilege" a secret from a federal grand jury. Friedland and his co-directors are trying to withhold information on the mine's environmental problems, finances and discussions with state regulators and mine consultants. Friedland's law firm claims that about 1,800 documents are subject to attorney-client privilege protection, notes The Denver Post. Imagine the creative ways that Friedland and his cohorts at Summitville could use an audit privilege and then ask yourself the following question: do companies need another tool to conceal information from the public and the government?

In conclusion, I urge you to reject S. 582 and start over with a bill that does a better job of balancing the common good and the public's right to know with private interests.

Grand jury investigating Summitville chief

By Mark Obmascik
Denver Post Southwestern Writer

5-15-90

Robert Friedland, the financial brains behind the disastrous Summitville gold mine, is a subject of a federal grand jury probe of the bankrupt Superfund site, according to records obtained by The Denver Post.

It's the first public indication that Friedland, a Singapore financier whose personal wealth exceeds $400 million, is being investigated by the grand jury in Denver. Ironically, the disclosure came because of a Friedland lawsuit in Canada attempting to keep Summitville information a secret.

The grand jury so far has indicted two former mine managers and obtained a guilty plea to 60 environmental crimes and other felonies from Summitville Consolidated Mining Co., the corporate owner of the mine. Friedland has denied knowledge of wrongdoing at Summitville.

Friedland's attorneys, Howard Shapray of Vancouver, Canada, and Lee Foreman of Denver, did not return phone calls yesterday.

The federal prosecutor directing the Summitville probe, Ken Firnberg, declined to comment, saying grand jury issues are confidential.

Although grand jury investigations are secret under federal law, some details of the Summitville probe became public after Friedland and three other former directors filed a lawsuit in Vancouver seeking to bar a Denver law firm from releasing documents about the mine.

Summitville filed for bankruptcy in December 1992 and forced an emergency takeover by the Environmental Protection Agency which expects to spend at least $120 million on a Superfund cleanup. The mine is in the San Juan Mountains in southwestern Colorado, near Del Norte.

Please see MINE, Back Page, Col. 5

Grand jury wants law firm's documents on Summitville

MINE from Page 1A

"The issue in the Vancouver lawsuit is whether the Denver law firm of Parcel, Mauro, Hultin & Spaanstra, which represented the mine's corporate owner until November 1992, can provide the federal grand jury with mine documents marked "Attorney-Client Privilege."

Attorney-client privilege is a legal tenet that bans lawyers from publicly disclosing private advice and talks with their customers.

In court filings, Friedland and the other former mine directors argue that the law firm's attorney-client privilege extends not only to the corporation but to corporate directors as well.

The Denver law firm responded in court that it never had an attorney-client relationship with officials of Summitville or its parent companies.

That issue is key to the grand jury's investigation.

If a judge finds that attorney-client privilege does extend to corporate officers, then the grand jury won't be able to review some documents on Summitville's operations.

Lawsuit offers glimpse

Because of Friedland's lawsuit, a copy of the grand jury's subpoena of the Parcel Mauro law firm was included in the public court file in Vancouver. Grand jury subpoena generally are off-limits to public scrutiny.

The 10-page subpoena, filed Sept. 27, 1993, seeks, among other things, all documents and records involving Parcel Mauro and former Summitville managers, including Friedland and the three other former directors: Robert Leighton Cook of Pinantan Lake, B.C., Peter Geest of Vancouver and Charles J.G. Russell of the Channel Islands.

In court filings, the U.S. Justice Department argued that the documents are not protected by attorney-client privilege and "that the evidence is essential to the successful completion of an ongoing investigation."

State law requires a judge to approve any subpoena of a lawyer concerning a former client. U.S. District Judge Edward Nottingham is reviewing the subpoena, though that case file has been sealed by court order.

The subpoena asks all records now filed at the Denver law firm that discuss "drainage, flows, discharges seeps, spills or runoff" from the Summitville mine, as well as any other discussions of environmental problems, fish kills and hazardous-waste issues. It also seeks records of Summitville's finances and discussions with state regulators and mine consultants.

In a court affidavit, Friedland's Denver lawyer, Foreman, said the law firm was paid more than $1.1 million through 1993 to represent Summitville's corporate owner. Friedland's lawyer noted that Parcel Mauro traveled at least four separate times to Canada to discuss business with mine directors.

The Vancouver lawsuit, filed Jan. 20, claims that the Denver law firm has about 1,800 documents that should be subject to attorney-client privilege protection, though it's unclear how many records directly involve Friedland and the other three former directors.

The legal action is the second time that Friedland's efforts to use Canadian courts to promote secrecy have backfired.

In August 1993, Friedland obtained a gag order that prevented Canadian journalists from disclosing embarrassing personal information about him. While preparing a report on Summitville and Friedland, the Canadian Broadcasting Corp. learned that Friedland had been convicted in 1971 for selling 8,000 tablets of LSD to a federal narcotics agent in Portland, Maine.

To block that story, Friedland persuaded a Vancouver judge to issue the gag order. Canadians were banned from reporting details about Friedland's gag case, including where the legal proceedings were being heard or what they were about. The court hearings themselves were secret.

Because Friedland had filed the court action as "John Doe," Canadian journalists couldn't even identify Friedland as the man behind the gag order.

Post blows whistle

In the meantime, though, The Denver Post learned that Friedland had orchestrated the gag order with his Vancouver attorney, Shapray. When the Post published a story identifying Friedland as the man behind the gag order — and a Post editorial urged Americans to defy the gag by faxing copies of the story and editorial to friends north of the border — the case became a front-page story across Canada.

By the time a Vancouver judge lifted the gag, Friedland had become a national celebrity in Canada.

Since leaving Summitville in 1990, Friedland has stumbled into a major mining discovery in Labrador. His stock in that company, Diamond Fields, is estimated to be worth more than $400 million.

In the Vancouver court filing, Friedland now lists a home address in Singapore.

ISBN 0-16-055091-2

90000

9 780160 550911